State Library Of North Carolina
Raleigh, N.C.

THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1997 CUMULATIVE SUPPLEMENT

Volume 2

Chapters 1A through 7A

Prepared under the supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

R.W. WALTER, P.R. ROANE, K.J. KENNEDY,
R.B. LAYNE, F.J. PAYNE AND B.J. STINNIE

Annotated through 486 S.E.2d 626. For complete scope of annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

MICHIE
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1997

45:22

COPYRIGHT © 1984–1997
BY
MICHIE,
A DIVISION OF REED ELSEVIER INC.
AND REED ELSEVIER PROPERTIES INC.

All rights reserved.

5169115

"Michie" and the Open Book and Gavel logo are trademarks of
Michie, a division of Reed Elsevier Inc.

Preface

This Cumulative Supplement to Volume 2 contains the general laws of a permanent nature enacted by the General Assembly through the 1997 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Digitized by the Internet Archive
in 2026 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso02nort_67

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1997 Regular Session affecting Chapters 1A through 7A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 344, p. 732.
North Carolina Court of Appeals Reports through Volume 123, p. 790.
South Eastern Reporter 2nd Series through Volume 486, p. 626.
Federal Reporter 3rd Series through Volume 116, p. 875.
Federal Supplement through Volume 965, p. 1486.
Federal Rules Decisions through Volume 172, p. 600.
Bankruptcy Reports through Volume 209, p. 549.
Supreme Court Reporter through Volume 117, p. 1864.
North Carolina Law Review through Volume 75, p. 1088.
Wake Forest Law Review through Volume 32, p. 217.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

The General Statutes of North Carolina 1997 Cumulative Supplement

VOLUME 2

Chapter 1A.

Rules of Civil Procedure.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule
4. Process.
5. Service and filing of pleadings and other papers.

Article 3.

Pleadings and Motions.

9. Pleading special matters.

Article 4.

Parties.

17. Parties plaintiff and defendant; capacity.

Article 5.

Depositions and Discovery.

Rule
28. Persons before whom depositions may be taken.
30. Depositions upon oral examination.

Article 6.

Trials.

39. Trial by jury or by the court.
40. Assignment of cases for trial; continuances.
44.1. Determination of foreign law.

Article 7.

Judgment.

55. Default.
58. Entry of judgment.

§ 1A-1. Rules of Civil Procedure.

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

Cited in In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653 (1994).

Rule 2. One form of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Cited in Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991); Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (1996).

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Extension of Time. — Plaintiff commenced the action before the statute of limitations expired, by filing an application and order extending time to file a complaint. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Expiration of Time Extension. — When plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend their time in which to file their complaint under N.C.R.Civ.P., Rule 6(b) thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run out, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Applied in Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991).

Stated in Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991); Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227 (1993); Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993); In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994); Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

OPINIONS OF ATTORNEY GENERAL

In order for a court to revoke an irrevocable preneed contract a civil action must be initiated by the filing of a complaint with the necessary parties being the purchaser, the preneed funeral home license and, if other than the purchaser, the preneed funeral contract beneficiary. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Rule 4. Process.

(a) *Summons — Issuance; who may serve.* — Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons — Contents.* — The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

(c) *Summons — Return.* — Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 30 days after the date of the issuance of summons, except that in tax and assessment foreclosures under G.S. 47-108.25 or G.S. 105-374 the time allowed for service is 60 days. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons — Extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete

service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 47-108.25 and G.S. 105-374, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, for service upon a defendant in a place not within the United States, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made at least once every two years; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action if sued out within two years of the last preceding summons in the chain of summonses or within two years of the last prior endorsement.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons — Discontinuance.* — When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons — Date of multiple summonses.* — If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4(a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4(d).

(g) *Summons — Docketing by clerk.* — The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or non-service.

(h) *Summons — When proper officer not available.* — If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) *Summons — When process returned unexecuted.* — If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

(i) *Summons — Amendment.* — At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process — Manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. — Except as provided in subsection (2) below, upon a natural person:

  a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or

  b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

  c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

(2) Natural Person under Disability. — Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

  a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. — Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general.

(4) An Agency of the State. —

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies. —

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, or (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii).

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

(7) Partnerships. — Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers. — Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

(9) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(j1) *Service by publication on party that cannot otherwise be served.* — A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA ________ COUNTY

In the ________ Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than ________, 19____) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows:

(State nature.)

You are required to make defense to such pleading not later than (________, 19____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ________ day of ________, 19____

________ (Attorney) (Party)

________ (Address)

(j2) *Proof of service.* — Proof of service of process shall be as follows:

(1) Personal Service. — Before judgment by default may be had on personal service, proof of service must be provided in accordance with the requirements of G.S. 1-75.10(1).

(2) Registered or Certified Mail. — Before judgment by default may be had on service by registered or certified mail, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(4). This affidavit together with the return receipt signed by the person who received the mail if not the addressee raises a presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's

dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address.

(3) Publication. — Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(2).

(j3) *Service in a foreign country.* — Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

- a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;
- b. As directed by the foreign authority in response to a letter rogatory or letter of request; or
- c. Unless prohibited by the law of the foreign country, by
  - 1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;
  - 2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) *Process or judgment by default not to be attacked on certain grounds.* — No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) *Personal jurisdiction by acceptance of service.* — Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(k) *Process — Manner of service to exercise jurisdiction in rem or quasi in rem.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known. — If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j), or, if otherwise appropriate section (j1); except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2).

(2) Defendant Unknown. — If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j1), except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4; 1971, c. 962; c. 1156, s. 2; 1975, cc. 408, 609; 1977, c. 910, ss. 1-3; 1981, c. 384, s. 3; c. 540, ss. 1-8; 1983, c. 679, ss. 1, 2; 1989, c. 330; c. 575, ss. 1, 2; 1995, c. 275, s. 1; c. 389, ss. 2, 3; c. 509, s. 135.1(e), (f); 1997-469, s. 1.)

Local Modification. —

By virtue of Session Laws 1997, c. 450, s. 4, Wake: 1995, c. 441, s. 1 should be stricken from the main volume.

Editor's Note. —

The subdivision (j)(9) designation was assigned by the Revisor of Statutes, the designation in Session Laws 1995, c. 389, s. 2 having been (j)(10).

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added the third paragraph of subsection (d).

CASE NOTES

- I. In General.
- II. Personal Service on Natural Persons.
  - A. In General.
  - C. Service by Registered or Certified Mail.
- IV. Service on Corporations.
- V. Service by Publication.
- VI. Amendment of Summons.
- VII. Discontinuance and Extensions.

I. IN GENERAL.

Summons Must Be Served Within 30 Days. — Under this rule, a summons must be served within 30 days of its issuance. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Basis for 30 Day Delivery. — This rule does not require delivery of the summons to the sheriff within thirty days of its issuance in order that the summons may later serve as a basis for the issuance of an alias or pluries summons. Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996).

Where summons is not served within the statutory period, etc. —

A summons not served within 30 days loses its vitality and becomes functus officio, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Although a summons not served within 30 days becomes dormant and unservable, under Rule 4(c) it is not invalidated nor is the action discontinued. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Failure to Deliver Summons to Sheriff. — There is no requirement under this rule that plaintiffs must prove good faith, excusable neglect, or even give any reason at all to justify their failure to promptly deliver the summons to the sheriff. Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996).

Irregularity in Summons. — Where there was no confusion as to the identity of the actual defendant, as evidenced by the complaint and the caption of the summons, a slight irregularity was not fatal because the summons was properly directed to the city, and the city was properly named as the defendant. Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241, cert. improvidently granted and appeal dismissed, 339 N.C. 734, 455 S.E.2d 155 (1995).

Summons Held Valid. — Summons was valid process under this rule, whether the court treated the summons with which defendants were eventually served as an original summons or as an alias and pluries summons. CBP Resources, Inc. v. Ingredient Resource Corp., 954 F. Supp. 1106 (M.D.N.C. 1996).

Neglect Required for Appointment of Private Process Server. — Something more than mere failure to act is needed for conduct to constitute neglect under paragraph (h) of this rule. Williams v. Williams, 113 N.C. App. 226, 437 S.E.2d 884 (1994), aff'd, 339 N.C. 608, 453 S.E.2d 165 (1995).

Defense of Insufficient Service on "John Doe" Defendant Not Available to Insurance Company. — Where respondent was provided with appropriate notice of the action below, it could not attempt to defend its prior election not to provide a defense to a John Doe defendant by alleging that service of process on "John Doe" was insufficient. Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990).

Issuance of Second Summons. — Although summons was not properly issued at first, the issuance of a second summons commenced a new action on the date it was issued. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

60 Day "Saving Provision" in Subdivision (j2)(2). — A careful review of this saving provision indicates it is limited in scope and may only be employed where: (1) the original service was made by registered or certified mail upon a person residing in the addressee's dwelling house or usual place of abode; and (2) it later appears "the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

The circumstance of the summons being placed in the court file subsequent to entry of judgment by default is insufficient to affect validity of either the summons or the judgment itself. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

Mailing of Process. — In child custody cases where actual notice has been received, service of process is proper notwithstanding a person other than the clerk's office mailing the process. Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996).

Applied in In re Adoption of P.E.P., 100 N.C. App. 191, 395 S.E.2d 133 (1990); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

Quoted in Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991); McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994).

Stated in Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

Cited in Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993); In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994); Locklear v. Scotland Mem. Hosp., 119 N.C. App. 245, 457 S.E.2d 764 (1995); Better Bus. Forms, Inc. v. Davis, 120 N.C. App. 498, 462 S.E.2d 832 (1995); Hemmings v. Green, 122 N.C. App. 191, 468 S.E.2d 278 (1996); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Davis v. North Carolina Dep't of Human Resources, — N.C. App. —, 485 S.E.2d 342 (1997).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Rebuttable Presumption, etc. — When the officer's return of the summons shows legal service a presumption of valid service of process is created. Greenup v. Register, 104 N.C. App. 618, 410 S.E.2d 398 (1991).

Same — Service of Summons Prerequisite to Individual Liability. — General partner who was not made a party to the defendant's counterclaim or served with a copy of a summons, could not be held personally liable for a judgment against the partnership. Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

Actions Constituting Effectual Service. — Evidence was sufficient to find that the plaintiff exercised due diligence in attempting to ascertain the address or whereabouts of defendant where plaintiff's counsel attempted service at two available addresses, consulted the local telephone directory and the department of motor vehicles to obtain information, contacted the defendant's insurer and attorney seeking information as to defendant's whereabouts and finally wrote the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California." Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

C. Service by Registered or Certified Mail.

Service by Certified Letter Insufficient. — Where plaintiff's sole attempt at personal service of notice consisted of a certified letter mailed to the business address of a partnership, a postal box number, this solitary venture constituted neither application of "due diligence" as required by subsection (j1) nor a "reasonable and diligent effort" as required by § 45-21.16(a). Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 446 S.E.2d 883 (1994).

Service in Foreign Countries. — Service of summons addressed to the defendant in care of his mother at an address in South Africa, the home of defendant's brother, was sufficient where clerk's certificate reflected that the return receipt indicated the complaint and summons were in fact received at the stated address by the individual whose signature appeared thereon. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

IV. SERVICE ON CORPORATIONS.

Substitute Service Improper. — Where plaintiff's attorney had actual knowledge of an address where defendant could be served and did not attempt to serve defendant at the known address, substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights. Interior Distribs., Inc. v. Hartland Constr. Co., 116 N.C. App. 627, 449 S.E.2d 193 (1994).

V. SERVICE BY PUBLICATION.

Publication in County Where Action Is Pending. — Whereas defendant's last know address was in Wake County and despite reasonable efforts, plaintiff had "no reliable information" as to the defendant's whereabouts, publication was proper in the county in which the action was pending. Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

Parental Rights Termination Case. — Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by § 7A-289.25, where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with subdivision (j1) of this rule and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Service of petition and summons to terminate parental rights by publication must comply with § 7A-289.27 and subdivision (j1) of this rule. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

VI. AMENDMENT OF SUMMONS.

The power of the court to allow amendment of process is discretionary and permits amendment to correct a misnomer or mistake in the name of a party. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

Amendment Improper. — The named defendant in the original summons and complaint, "Winn Dixie Store, Inc.", was not a mistake or misdescription permitting the amendment of the summons where the name was the correct name of the wrong corporate party defendant, this was a substantive mistake which was fatal to the action. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

Amendment Held Appropriate — Trial court failed to exercise its discretion in denying plaintiff's motion to amend his summons under subsection (1) to substitute the correct county on the summons when there was no showing of any material prejudice to defendants; therefore the case was remanded to the Court of Appeals. Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

VII. DISCONTINUANCE AND EXTENSIONS.

Extensions, Generally. —

This rule specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

"Discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with section (d) of this rule. Thereafter a new action may be filed, but the date for purposes of the statute of limitations is that of the later filing. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991).

Discontinuance on Failure to Secure Extension of Time for Service. — Where plaintiff, presented with the return of her summons unserved, failed to continue her action by securing an endorsement upon the original summons for an extension of time within which to complete service of process pursuant to subsection (d)(1) of this rule, and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to subsection (d)(2), the plaintiff's action was consequently discontinued 90 days after the date the original summons was issued. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991), holding that plaintiff's action was barred by the statute of limitations.

Service of Dormant Summons. — Where defendant was served with a dormant summons within the 90-day limit, rather than notice of a discontinued action, the trial court had the authority pursuant to the language of subsection (b) to extend the time for service of process under subsection (c), "to permit the act to be done where the failure to do the act was the result of excusable neglect." Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994).

Allowance of Voluntary Dismissal Held Nugatory. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because § 7A-217(4) states that the procedure found in § 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under § 42-29. The requirements for actual service of process found elsewhere in G.S. § 7A-213 and in this rule would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Filing by telefacsimile transmission.* — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, procedures and specifications for the filing of pleadings or other court papers by telefacsimile transmission, filing may be made by the transmission when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1.)

CASE NOTES

Requests for Monetary Relief. — A request for monetary relief sought must be served, and the request must also be filed with the court unless it can be shown to be a discovery document of the type specifically excepted in subdivision (d) of this rule. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request for a statement of monetary relief sought was ever filed with the court. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

A request for a statement of monetary relief sought cannot be considered a discovery document of the type specifically excepted in subdivision (d) of this rule. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Affidavit Served Prior to Hearing. — Plaintiff's affidavit was served on defendant's attorney within the meaning of subsection (b), when it was mailed prior to hearing even though opposition did not see it until at the hearing. Hedrick v. Rains, 344 N.C. 729, 477 S.E.2d 171 (1996).

Cited in Gummels v. North Carolina Dep't of Human Resources, 98 N.C. App. 675, 392 S.E.2d 113 (1990); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995).

Rule 6. Time.

CASE NOTES

I. In General.
II. Enlargement of Time.
III. Effect of Expiration of Session.
IV. Service of Motions and Affidavits.
V. Additional Time after Service by Mail.

I. IN GENERAL.

Responsibility to Pay Fee. — Failure to pay the filing fees would not be excused because counsel relied upon the statement of an anonymous Assistant Clerk of Court that no fee was required, and when the notice of appeal was filed with the county clerk's office, no fee was assessed. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Applied in Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993); Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994); Hedrick v. Rains, 344 N.C. 729, 477 S.E.2d 171 (1996).

Cited in Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990); Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Locklear v. Scotland Mem. Hosp., 119 N.C. App. 245, 457 S.E.2d 764 (1995); Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995); Sykes v. Keiltex Indus., Inc., 123 N.C. App. 482, 473 S.E.2d 341 (1996); Hockaday v. Lee, 124 N.C. App. 425, 477 S.E.2d 82 (1996).

II. ENLARGEMENT OF TIME.

What Time Limits May Be Extended. —

Magistrate did not have the authority under § 1A-1, Rule 60(b) to extend the time provided in § 7A-228 for party to pay appeal fees. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Failure to File Within Extended Time. — Where plaintiffs filed for an extension of time to file their complaint for medical malpractice and loss of consortium, which the court granted, but plaintiffs did not file their complaint until 19 days later, when plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend the time in which to file their complaint under section (b) of this Rule, thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

A section 1A-1, Rule 12(b) defense contained in an answer is not the same as a 1A-1, Rule 12(b) defense raised in a motion, and affidavits filed in support of a 1A-1, Rule 12(b) defense contained in an answer is not governed by the time constraints found in subsection (d) of this rule. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

III. EFFECT OF EXPIRATION OF SESSION.

This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

This rule clearly allows a superior court judge to sign a written order out of session without the consent of the parties so long as the hearing to which the order relates was held in term. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

Entry of Orders Out of Session. — Judges did not lack subject matter jurisdiction to enter equitable distribution judgment and permanent alimony order where both were entered out of session. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

There was both statutory and common law authority for the trial court's entry of its supplemental judgment, because § 7A-47.1 and this rule both authorize the entry of judgment out of session. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

IV. SERVICE OF MOTIONS AND AFFIDAVITS.

Section (d) of this rule relates only to the hearing of motions. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Extension of Time for Filing Affidavits Supporting Summary Judgment. — Despite the specific language of § 1A-1, Rule 56(c) requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Filing of Affidavits on Day of Summary Judgment Hearing. — If a request for permission to file affidavits in support of a motion under § 1A-1, Rule 56 is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to the date of the summary judgment hearing, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Editor's Note. *— The annotation under the catchline "Section (e) Held Inapplicable" in the main volume under this section should read:*

Section (e) Held Inapplicable. — Plaintiff's motions for entry of default and default judgment, which were filed 31 days after service of summons and complaint on defendant, were made after defendant's time to answer had expired, as although summons and complaint were served upon defendant by mail, section (e) of this rule did not apply to extend his time to answer to 33 days, because the 30 days defendant had under § 1A-1, Rule 12 to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

No Reversible Error Where Defendants Not Prejudiced by Untimely Notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to section (e) of this rule and § 1A-1, Rule 56(c). Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. Symons Corp. v. Quality Concrete Constr., Inc., 108 N.C. App. 17, 422 S.E.2d 365 (1992).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

CASE NOTES

I. In General.
II. Pleadings.
III. Motions and Other Papers.

I. IN GENERAL.

Applied in Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990).

Stated in Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997).

II. PLEADINGS.

Joining Request for Equitable Distribution in a Reply. — A plaintiff in a divorce action may admit to a claim for equitable distribution in a reply, and join in the claims for an equitable distribution of the marital property through a reply pleading. The defendant is precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim. Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994).

III. MOTIONS AND OTHER PAPERS.

Waiver of Notice. — Where the content of plaintiff's notice of hearing to modify custody, seeking "such relief as to the court may seem just and proper," was insufficient to comply with the requirement that the motion state the grounds therefor and the relief or order sought, but defendant's attorney failed to object, defendant waived proper notice of plaintiff's motion to modify custody. Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Pre-answer Motion to Dismiss was not a responsible pleading within the confines of Rule 12 of the North Carolina Rules of Civil Procedure, preventing the entry of default judgment pursuant to Rule 55 of the Rules of Civil Procedure. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

Name and Number of Rule, etc. — While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Trial court erred in granting a motion captioned "Motion to Forfeit Security Deposit" in a landlord-tenant dispute, where the motion was in essence an attempt to amend the complaint, which made no reference to a security deposit, and judgment had been entered in the case. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Timeliness of Responsive Pleading. — Although plaintiff had no right to file a responsive pleading to the answer under this rule, plaintiff did have a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Rule 8. General rules of pleadings.

CASE NOTES

I. In General.
II. Pleadings; Generally.
III. Affirmative Defenses.

I. IN GENERAL.

Taken together, § 1A-1, Rule 12(b)(6) and section (a) of this rule suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Purpose of Section (a). — The purpose of section (a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Sanctions for Violations. — Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient; therefore, the trial court did not err in only striking the punitive damages award in the slander case as a sanction. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

Applied in Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990); Wallace v. Haserick, 105 N.C. App. 315, 412 S.E.2d 694 (1992); Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193 (1992); Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994); Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); Haywood Street Redevelopment Corp. v. Harry S. Peterson, Co., 120 N.C. App. 832, 463 S.E.2d 564 (1995).

Stated in Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Metric Constructors, Inc. v. Industrial Risk Insurers, 102 N.C. App. 59, 401 S.E.2d 126 (1991); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Marler v. Amoco Oil Co., 793 F. Supp. 656 (E.D.N.C. 1992); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993); Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994); Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603 (1994); Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997).

II. PLEADINGS; GENERALLY.

Damages Governed by Evidence Presented. — There is a longstanding rule that damages in this state are governed by the evidence presented rather than the claim made for relief; the fact that the complaint contained a much lower figure than the amount awarded did not mean that the trial judge abused his discretion. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Punitive Damages Need Not Be Specially Pled. — Where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Allegations Sufficient to Give Rise to Punitive Damages Claim. — Where complaint alleged that defendant intentionally pointed a gun at the plaintiffs in an attempt to intimidate them, reached into plaintiff's vehicle and struggled with her, making contact with plaintiff infant and plaintiff mother in the process, the acts were intentional acts of the type giving rise to punitive damages. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Applicability of Subdivision (a)(2). — Subdivision (a)(2) does not apply to diversity cases in U.S. District Court, and therefore could not provide a basis for dismissal of diversity personal injury action. Creech v. Denning, 148 F.R.D. 545 (E.D.N.C. 1993).

Dismissal May Not Be Imposed Mechanically. — Although dismissal under subsection (a)(2) of this rule is within the discretion of the trial court, when the rule is violated such sanction may not be imposed mechanically. Because the drastic sanction of dismissal is not always the best sanction available to the trial court and is certainly not the only sanction available, dismissal is to be applied only when the trial court determines that less drastic sanctions will not suffice. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

Disability Need Not Be Pleaded. — Plaintiff was not required to plead mental disability in avoidance of the affirmative defense of statute of limitations. Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996).

Requests for Monetary Relief. — A request for monetary relief sought must be served, and the request must also be filed with the court unless it can be shown to be a discovery document of the type specifically excepted in Rule 5(d). Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request for a statement of monetary relief sought was ever filed with the court. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

A request for a statement of monetary relief sought cannot be considered a discovery document of the type specifically excepted in Rule 5(d). Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

III. AFFIRMATIVE DEFENSES.

Failure to Plead Barred Issue on Appeal. — Defendants' failure to plead plaintiffs' contributory negligence case was a bar to this issue being raised on appeal. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), discretionary review denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Failure to Plead Res Judicata. — The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Where a defendant does not raise an affirmative defense, etc. —

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

Complaint Sufficient to Put Defendants on Notice of a Contract. — Complaint alleging, that there was an express contract between plaintiff and defendants for payment of funeral expenses was sufficient to put defendants on notice of a contract; therefore, where defendants did not specifically plead the affirmative defense of the statute of frauds as required by § 1A-1, Rule 8(c), it would not be available as a defense to the contract. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Failure to Cite Statutory Statute of Limitations Provision. — Failure to plead § 1-52(16) by precise number and subdivision is not fatal under subsection (c) of this Rule. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Effect of an Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Rule 9. Pleading special matters.

(a) *Capacity.* — Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, duress, mistake, condition of the mind.* — In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* — In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.* — In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* — In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* — For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* — When items of special damage are claimed each shall be averred.

(h) *Private statutes.* In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996, and the court shall thereupon take judicial notice of it.

(i) *Libel and slander.* —

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(j) *Medical malpractice.* — Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

(k) *Punitive damages.* — A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. The amount of damages shall be pled in accordance with Rule 8. (1967, c. 954, s. 1; 1995, c. 20, s. 10; c. 309, s. 2; c. 514, s. 3.)

Editor's Note. — Session Laws 1995, c. 20, s. 17 provides that sections 1 through 16 of this act shall become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 are approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 shall become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997.

Session Laws 1995, c. 309, which amended this section by adding subsection (j), in s. 3, provides that the amendment to this section is not intended, and shall not be construed, to enlarge or diminish the doctrine of res ipsa loquitur in medical malpractice claims.

Session Laws 1995, c. 514, s. 4, is a severability clause.

Effect of Amendments. — Session Laws 1995, c, 20, s. 10, effective on or after January 1, 1997 if constitutional amendments proposed by 1995, c. 5. ss. 1-2 are approved, inserted "if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996" in subsection (h). Those constitutional amendments were approved.

Session Laws 1995, c. 309, s. 2, effective January 1, 1996, and applicable to actions filed on or after that date, added subsection (j).

Session Laws 1995, c. 514, s. 3, effective January 1, 1996, and applicable to claims for relief arising on or after that date, added subsection (k).

CASE NOTES

I. In General.
III. Fraud, Duress, Mistake, etc.
IV. Conditions Precedent.

I. IN GENERAL.

Applied in Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994).

Quoted in Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994).

Cited in George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 393 S.E.2d 580 (1990); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

III. FRAUD, DURESS, MISTAKE, ETC.

Insufficient Allegation of Fraud Subjects Plaintiff to Summary Judgment. — Plaintiff cannot simply allege fraud and thereby escape summary judgment; therefore, where plaintiff asserted defendant never intended to honor its obligations, dismissal of the issue was appropriate. Strum v. Exxon Co., 15 F.3d 327 (4th Cir. 1994).

Fraud by Corporation. — Plaintiff's claim that corporation fraudulently induced him to purchase property and execute a note did not meet the particularity requirements because there was no allegation that the representations which the corporation's agent made were false or that the agent either knew them to be false or made them with reckless indifference to the truth. Trull v. Central Carolina Bank & Trust Co., 117 N.C. App. 220, 450 S.E.2d 542 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 267 (1995).

IV. CONDITIONS PRECEDENT.

Statutes of Repose. — Under North Carolina law statutes of repose are conditions precedent which must be specially pled. Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603, aff'd, 340 N.C. 257, 456 S.E.2d 308 (1995); Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

Where plaintiff failed to specially plead that its action was brought within the applicable statute of repose, plaintiff's cause of action was insufficient as a matter of law. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

Rule 10. Form of pleadings.

CASE NOTES

Where affidavits considered by the trial court were not incorporated by reference into the pleadings pursuant to subdivision (c) of this rule, a motion to dismiss was converted into a motion for summary judgment. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

Cited in Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Rule 11. Signing and verification of pleadings.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

CASE NOTES

I. In General.

I. IN GENERAL.

In analyzing whether the complaint meets the factual certification requirement, the court must determine: whether the plaintiff (1) undertook a reasonable inquiry into the facts and (2) after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

Lack of Verification. — Petition for a contested case hearing, containing signatures of petitioner and his attorney, but which failed to include either an affidavit executed by petitioner or an affidavit executed by his attorney, was timely filed but was not verified under sections (b) and (c) of this rule when it was filed. Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993), pet. disc. rev. denied, 334 N.C. 163, 432 S.E.2d 359 (1993).

Sanction Provision Not Applicable to Claims Filed Before Amendment of This Rule. —

Although plaintiffs and their attorney could be liable for sanctions under this Rule for signing and filing certain "other papers" for an improper purpose after January 1, 1987, the complaint in the case at bar was filed in December of 1986, and therefore could not be a basis for the imposition of sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

When Sanctions May Be Imposed. — To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the legal or factual certification requirements of this rule. In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

Sanctions Following Voluntary Dismissal. — Absent a rule to the contrary, sanctions motions may appropriately be filed after a voluntary dismissal. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997).

Sanctions Where Party Knew

Pleadings Not Factually Plausible. — Where judge announced the rendering of an absolute divorce in open court while defendant was present with counsel, when defendant's motion to dismiss based on lack of service was later filed defendant knew that the pleading was not factually plausible because he had made a general appearance; therefore, the trial court's imposition of sanctions under this rule was proper. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Sanctions were not appropriate for alienation of affections claim. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

The Improper Purpose Prong. — The improper purpose prong of this Rule is separate and distinct from the factual and legal sufficiency requirements. Certification under the rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, and that it is not interposed for any improper purpose. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Even if the complaint is well grounded in fact and in law, it may nonetheless violate the improper purpose prong of this rule. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

A claim, while well grounded in law, can nevertheless violate the improper purpose prong of this Rule. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

While attorney's filing of the notice of lien against former client after having withdrawn from the case violated the legal sufficiency prong of this rule, that itself did not support a strong inference of improper purpose. However, the totality of the circumstances did. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose of Rule 11. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Objective Standard Used to Determine Improper Purpose. — An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Trial court's decision to impose or not to impose, etc. —

In accord with the main volume. See Williams v. Garrison, 105 N.C. App. 79, 411 S.E.2d 633 (1992).

After a voluntary dismissal the broad limitation on the trial court's power to enter orders does not extend so far as to bar the trial court from awarding attorney's fees pursuant to subsection (a) of this Rule or § 6-21.5. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

Inference of Improper Purpose Inferred from Objective Behavior. — Under this rule, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Reasonableness of Belief That Claim Is Warranted. — The reasonableness of the belief that a complaint is warranted by existing law must be judged as of the time the document was signed. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Motion for Attorney's Fees. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Award of Attorneys' Fees Upheld. —

Where plaintiff had violated this section, the trial court acted within its discretion in awarding reasonable attorney's fees as an appropriate sanction. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

Findings and Conclusions Insufficient to Support Sanctions. — Court's findings and conclusions were insufficient to support an award of sanctions, where the order recited that "sanctions are imposed against plaintiff for violation of the legal provision and improper purpose provision" of Rule 11, but contained no findings or conclusions explaining how plaintiff's conduct violated these provisions, or to explain the appropriateness of the sanction imposed or award of attorney's fees, or to indicate how the court arrived at the amount. Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995).

Sanctions Not Merited. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation does not make their later claim for custody violative of this rule. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Although claimant was explicitly told by an employee of the Employment Security Commission that she was not required to conduct a job search during her temporary recall, because there were grounds for the Commission's holding, under § 96-18(g)(2), that claimant repay the sum, received as benefits, based on failure to conduct a job search, sanctions could not be imposed. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Attorney made a "reasonable inquiry" into the factual bases for the allegations contained in the complaint regarding conspiracy, an auto theft-drug ring, and intentional infliction of emotional distress; therefore, the sanctions imposed against attorney were not warranted. Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873, aff'd, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

It was improper for the trial court to impose Rule 11 sanctions on plaintiff for his failure to promptly serve the summons and complaint, as it did not involve the filing of a pleading or other paper and was therefore beyond the scope of this Rule. Ward v. Lyall, 125 N.C. App. 732, 482 S.E.2d 740 (1997).

Imposition of Sanctions Upheld. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Insured and insured's attorney were properly assessed costs and expenses incurred by holder of security interest in insured's vehicle for improperly naming holder as a party in an action against vehicle's insurer, despite plaintiff's contention that holder was named in pleadings to give it notice as a lienholder. Lassiter v. North Carolina Farm Bureau Mut. Ins. Co., 106 N.C. App. 66, 415 S.E.2d 212, cert. denied, 332 N.C. 148, 419 S.E.2d 573 (1992).

A superior court award of $2,918.82 to reimburse plaintiff for attorneys' fees and expenses and an order to defendant to pay $1,000 to the clerk of superior court as an additional sanction for filing frivolous and vexatious motions to dismiss and for summary judgment was not an abuse of discretion where defendant persisted in advancing arguments which had been previously rejected by the courts. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Where a motion to dismiss and a motion for summary judgment were based on the same grounds that had proven baseless in past motions and appeals, and were patently frivolous, the trial judge had more than ample basis for imposition of sanctions. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Co-counsel for corporate defendant, almost 19 months after corporation employees' counsel gave notice that she was serving as co-counsel, and only two weeks before trial, signed and filed a motion for disqualification of counsel; neither his co-counsel nor his client signed it, and there was no evidence that co-counsel even knew that the motion was being filed, the late date on which the motion was filed indicated an attempt to interrupt opposing counsel's trial preparation and increase litigation costs. Therefore, Rule 11 sanctions were appropriate. Harrison v. Edison Bros. Apparel Stores, 146 F.R.D. 142 (M.D.N.C. 1993).

There was no abuse of discretion in the court's imposition of $931 in sanctions; the court found as a fact that defendant incurred $931.00 as a necessary consequence of plaintiff's notice of appeal following a voluntary dismissal and that the rate was reasonable. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Where the Employment Commission's signing of order remanding the matter to a hearing officer just three days prior to the date by which the Commission was to have entered a final order could be calculated as an attempt to delay the litigation or increase its cost, sanctions would apply. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Where ex-husband filed a complaint to harass ex-wife and needlessly increase the costs of litigation, where senseless litigation initiated by ex-husband had persisted since the parties' separation in 1986, while ex-husband claimed the litigation was part and parcel of his attempts to increase visitation privileges with his son, but he had done nothing constructive to further that objective, and testimony indicated that he has spent $20,000 trying to recover $10,000 in attorney's fees, the trial did not err in imposing $15,000 sanction against the ex-husband. Brown v. Brown, 112 N.C. App. 614, 436 S.E.2d 404 (1993).

Sanctions were properly imposed where the plaintiff's brief in opposition to defendant's motion to dismiss ignored well-established precedent and failed to argue for reversal or modification of well-established law. Sharp v. Miller, 121 N.C. App. 616, 468 S.E.2d 799 (1996), cert. denied, 343 N.C. 309, 471 S.E.2d 76, cert. denied, — U.S. —, 117 S. Ct. 187, 136 L. Ed. 2d 125 (1996).

Evidence overwhelmingly supported the trial court's finding that attorneys' actions in obtaining medical records were improper and the trial court's conclusion of law that the imposition of sanctions was appropriate. Bass v. Sides, 120 N.C. App. 485, 462 S.E.2d 838 (1995).

Harassment of Former Client. — In light of the obviously strained relationship between former attorney and client, and because it is utterly unreasonable for an attorney, particularly one who has withdrawn from the case, to file an attorney's charging lien seeking recovery of fees based on both quantum meruit and a percentage of the judgment, there exists a strong inference of improper purpose, i.e., harassment, in filing the notice of lien. Accordingly, the trial court's imposition of Rule 11 sanctions based on alleged improper purpose in filing the notice of lien must be upheld. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Subjective Beliefs and Actual Effect of Conduct Not Relevant. — Just as the Rule 11 movant's subjective belief that a paper had been filed for an improper purpose was immaterial in determining whether an alleged offender's conduct was sanctionable, whether the conduct did in fact harass was also not relevant to the issue. Rather, the dispositive question was whether the filing of the notice of lien supported a strong inference of improper purpose. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Denial of Sanctions Not Insulation from Future Sanctions. — The denial of sanctions does not insulate a party or an attorney from the future imposition of sanctions under the improper purpose prong of this rule if the litigation is continued after subsequent developments in the case render it meritless. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Features of Certification. — The central feature of this rule is a certification established by the signature of the person signing the pleadings, motions, or other papers. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Under this rule, in addition to certifying that the pleading or paper is well grounded in fact and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, the signer also certifies that the pleading or paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

The signature of an attorney under this rule simply certifies upon reasonable inquiry that the complaint is well grounded in fact and warranted by existing law; this signature does not demonstrate that there is genuine issue of material fact, in light of evidence gathered after the complaint is filed, as to whether a plaintiff would actually have prevailed on the underlying claim. Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995).

Two-Part Analysis. — An award of sanctions under this rule on the ground that a pleading is not warranted by existing law requires a two-part analysis. First, the court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible. If it is facially plausible, then the inquiry is complete, and sanctions are not proper. If the pleading is not facially plausible, then the second issue is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

In determining whether sanctions are warranted under the legal sufficiency prong of the rule, the court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then sanctions under this rule are appropriate. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Three-Part Analysis. — There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Collateral Issues. — Attorneys' fee requests under this rule raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under § 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to § 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under this rule or § 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Considerations for Court. — This rule raises three interconnected interpretive issues for the court: (1) When has sanctionable conduct occurred? (2) Who should be sanctioned, attorney, client, or both? (3) What sanction is appropriate? Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Inadequate Researching and Filing of Pleadings by Attorney. — Prior to imposing sanctions against an attorney under this rule on the ground that the nonmovant's pleadings are not warranted by the existing law, the movant must show that the attorney's conduct in researching and filing the pleadings was not objectively reasonable. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Failure of Attorney to Confirm Facts. — The attorney should be sanctioned for failure to take minimal steps to confirm the client's facts, when these facts could be verified easily by reference to the public record or to accessible documents. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991).

Sanctions Against Attorney and Client. — Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. However, "the sanction may fall in equal or greater proportion upon the client as well" as this allocation serves punitive and deterrent purposes. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Against Client. — Whether the violation of this rule is one of law, fact, or improper purpose, if the prejudice caused by the violation can only be remedied by entry of sanctions against the client, such sanctions are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Where a party misleads an attorney as to facts or the purpose of the lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

No Sanctions Against Client. — Clients should not be sanctioned when the attorney fails to ask the right questions to elicit legally relevant facts. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Allocation of Sanctions. — Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

De Novo Review of Sanctions. — Court of Appeals exercises de novo review of the question of whether to impose Rule 11 sanctions; if sanctions were warranted, the court must review the actual sanctions imposed under an abuse of discretion standard. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Sanctions Against State. — Even though this rule does not provide for sanctions against the State, that does not mean that judge did not have jurisdiction to decide this question; when he decided it, he could not be overruled by another superior court judge. Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995).

Reliance on Counsel by Nonlawyers as to Issues of Law. — Reliance on counsel by nonlawyers as to issues of law, is relevant, but not conclusive evidence on the issue of "reasonable inquiry." The reasonableness of the reliance would depend upon the surrounding circumstances including the extent of knowledge possessed by the lawyer about the facts of the controversy, the history and duration of the relationship between the attorney and client, and the relative expertise of the attorney relating to the legal issues involved. It is appropriate, however, to consider in evaluating the reasonableness of the inquiry that nonlawyers are not expected to appreciate the nuances of subtle legal issues. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Determining Compliance with Rule. — In determining compliance with this rule, courts should avoid hindsight and resolve all doubts in favor of the signer. Furthermore, whether the certification requirements have been met requires an objective determination. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Signature of Party Unnecessary for Sanctions. — Defendants were entitled to request sanctions against the attorney, as signer of complaint, and against plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Burdens of Proof and Persuasion. — When a motion is made for sanctions pursuant to this rule and the nature of the alleged violation is legal, rather than factual, this rule requires a two-part analysis. In such cases, the court should first scrutinize the challenged paper. If, on its face, the paper states a plausible legal theory (either under existing law or a good faith argument for a change in the law), there is no need for further inquiry. Only if the court concludes that the paper is not facially plausible in its legal analysis is there a need for further scrutiny into the actual conduct of the signer in researching or otherwise gathering the law. The movant bears the burden of persuasion on the first prong of the two-part analysis and the burdens of proof and persuasion on the second prong. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Harwell v. Harwell, 106 N.C. App. 389, 416 S.E.2d 595 (1992); Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992); Jerry Bayne, Inc. v. Skyland Indus., Inc., 108 N.C. App. 209, 423 S.E.2d 521 (1992); Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245 (1994); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995).

Quoted in In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Stated in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992); Williams v. Liggett, 113 N.C. App. 812, 440 S.E.2d 331 (1994).

Cited in McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990); Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); Pearsall v. Phillips, 839 F. Supp. 11 (E.D.N.C. 1993); Logan v. Logan, 116 N.C. App. 344, 447 S.E.2d 485 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 473 S.E.2d 638 (1996); Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996); Carter v. Stanly County, 125 N.C. App. 628, 482 S.E.2d 9 (1997).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

Legal Periodicals. —

For article, "Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach," see 15 Campbell L. Rev. 119 (1993).

For note, "Do You Need 'Will Insurance?' Let the Testator Beware — Hargett v. Holland," see 21 N.C. Cent. L.J. 353 (1995).

CASE NOTES

I. In General.
II. Answers and Time Therefor.
III. Preservation and Waiver of Defenses, Generally.
IV. Subject Matter Jurisdiction.
V. Personal Jurisdiction.
VII. Insufficiency of Process.
VIII. Insufficiency of Service.
IX. Failure to State Claim.
  A. In General.
  B. Conversion of Motion to Dismiss to Summary Judgment Motion.
XI. Motion for Judgment on the Pleadings.

I. IN GENERAL.

Taken together, subsection (b)(6) of this rule and § 1A-1, Rule 8(a) suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

An order entered out of session without the parties' consent is null and void and must be vacated pursuant to subsection (h)(3) of this rule. Turner v. Hatchett, 104 N.C. App. 487, 409 S.E.2d 747 (1991).

Subject Matter Jurisdiction of Court. — Superior court could not dismiss complaint with prejudice for failure to state a claim where the court lacked subject matter jurisdiction over plaintiffs' claim. Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 444 S.E.2d 636, cert. granted, 337 N.C. 691, 448 S.E.2d 522 (1994), review improvidently granted, 340 N.C. 357, 457 S.E.2d 599 (1995).

Distinction Between Motion to Dismiss and Motion for Summary Judgment. — The distinction between a motion to dismiss under subdivision (b)(6) of this rule and a motion for summary judgment is more than a mere technicality. When considering a motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Justiciable Controversy. — The mere filing of an affirmative defense, without more, is not sufficient to establish the absence of a justiciable issue, nor is the grant of a motion under subdivision (b)(6) of this rule, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40), this rule, and § 1A-1, Rules 23 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Applied in George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 393 S.E.2d 580 (1990); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); Pinehurst Area Realty, Inc. v. Village of Pinehurst, 100 N.C. App. 77, 394 S.E.2d 251 (1990), review denied and appeal dismissed, 328 N.C. 92, 402 S.E.2d 417 (1991); Lexington Aerolina, Inc. v. Murray Aviation, Inc., 100 N.C. App. 254, 394 S.E.2d 838 (1990); Harris-Teeter Super Mkts, Inc. v. Watts, 98 N.C. App. 684, 392 S.E.2d 123 (1990); Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990); Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Lynn v. Overlook Dev., 328 N.C. 689, 403 S.E.2d 469 (1991); Amos v. Oakdale Knitting Co., 102 N.C. App. 782, 403 S.E.2d 565 (1991); Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991); Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611 (1991); Coastal Leasing Corp. v. O'Neal, 103 N.C. App. 230, 405 S.E.2d 208 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Williams v. New Hanover County Bd. of Educ., 104 N.C. App. 425, 409 S.E.2d 753 (1991); Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164 (1992); Venable v. GKN Automotive, 107 N.C. App. 579, 421 S.E.2d 378 (1992); Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 423 S.E.2d 72 (1992); Monti ex rel. United States v. United Servs. Auto. Ass'n, 108 N.C. App. 342, 423 S.E.2d 530 (1992); White v. Williams, 111 N.C. App. 879, 433 S.E.2d 808 (1993); Reid v. Roberts, 112 N.C. App. 222, 435 S.E.2d 116 (1993); Poston v. Poston, 112 N.C. App. 849, 436 S.E.2d 854 (1993); Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994); O'Donnell v. City of Asheville, 113 N.C. App. 178, 438 S.E.2d 422 (1994); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Wilson, 113 N.C. App. 557, 439 S.E.2d 244 (1994); Floraday v. Don Galloway Homes, Inc., 114 N.C. App. 214, 441 S.E.2d 610 (1994); Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, cert. dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995); Winters v. Lee, 115 N.C. App. 692, 446 S.E.2d 123 (1994); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995); Gregory v. City of Kings Mt., 117 N.C. App. 99, 450 S.E.2d 349 (1994); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995); Leach v. Monumental Life Ins. Co., 118 N.C. App. 434, 455 S.E.2d 450 (1995); Brown v. Friday Servs., Inc., 119 N.C. App. 753, 460 S.E.2d 356 (1995); Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995); Jackson v. Carolina Hardwood Co., 120 N.C. App. 870, 463 S.E.2d 571 (1995); Hedrick v. Rains, 121 N.C. App. 466, 466 S.E.2d 281 (1996); Leandro v. State, 122 N.C. App. 1, 468 S.E.2d 543 (1996); Sharp v. Miller, 121 N.C. App.

616, 468 S.E.2d 799 (1996); Parker v. Turner, 122 N.C. App. 381, 469 S.E.2d 569 (1996); Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996); Freeman v. Blue Cross & Blue Shield, 123 N.C. App. 260, 472 S.E.2d 595 (1996); Chapman v. Byrd, 124 N.C. App. 13, 475 S.E.2d 734 (1996); Saxon v. Smith, 125 N.C. App. 163, 479 S.E.2d 788 (1997); Coggins v. Vonhandschuh, 124 N.C. App. 405, 477 S.E.2d 227 (1996); McAllister v. Ha, — N.C. App. —, 485 S.E.2d 84 (1997).

Stated in Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990); Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992); Adams Outdoor Adv. v. North Carolina DOT, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

Cited in May v. Martin, 99 N.C. App. 216, 392 S.E.2d 414 (1990); Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Beatty v. Charlotte-Mecklenburg Bd. of Educ., 99 N.C. App. 753, 394 S.E.2d 242 (1990); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990); McCollum v. McCollum, 102 N.C. App. 347, 401 S.E.2d 773 (1991); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Hart v. Ivey, 102 N.C. App. 583, 403 S.E.2d 914 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991); Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991); Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991); Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991); Daniels v. Hertz Corp., 104 N.C. App. 700, 411 S.E.2d 394 (1991); Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 412 S.E.2d 97 (1991); Ballance v. Rinehart, 105 N.C. App. 203, 412 S.E.2d 106 (1992); Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992); Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487 (1992); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); Tutterrow v. Leach, 107 N.C. App. 703, 421 S.E.2d 816 (1992); Nationwide Mut. Ins. Co. v. Silverman ex rel. Radja, 332 N.C. 633, 423 S.E.2d 68 (1992); Perkins v. CCH Computax, Inc., 333 N.C. 140, 423 S.E.2d 780 (1992); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993); Lindler v. Duplin County Bd. of Educ., 108 N.C. App. 757, 425 S.E.2d 465 (1993); Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468 (1993); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Capital Outdoor Adv., Inc. v. City of Raleigh, 109 N.C. App. 399, 427 S.E.2d 154 (1993); Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Gravitte v. Mitsubishi Semiconductor Am., Inc., 109 N.C. App. 466, 428 S.E.2d 254 (1993); Andrews v. Elliot, 109 N.C. App. 271, 426 S.E.2d 430 (1993); Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (1993); Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d 216 (1993); Considine v. West Point Dairy Prods., 111 N.C. App. 427, 432 S.E.2d 412 (1993); Bardolph v. Arnold, 112 N.C. App. 190, 435 S.E.2d 109 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993); Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt.

Auth., 335 N.C. 77, 436 S.E.2d 113 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Smith v. Smith, 113 N.C. App. 410, 438 S.E.2d 457 (1994); Naegele Outdoor Adv., Inc. v. City of Winston-Salem, 113 N.C. App. 758, 440 S.E.2d 842 (1994); Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994); City of Raleigh v. Hudson Belk Co., 114 N.C. App. 815, 443 S.E.2d 112 (1994); Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994); Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994); Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994); Howard v. Travelers Ins. Co., 115 N.C. App. 458, 445 S.E.2d 66 (1994) ; Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994); Smith v. Nationwide Mut. Fire Ins. Co., 116 N.C. App. 134, 446 S.E.2d 877 (1994); Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994); Regan v. Amerimark Bldg. Prods., Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995); Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995); Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995); Nationwide Mut. Ins. Co. v. Davis, 118 N.C. App. 494, 455 S.E.2d 892 (1995); Adams v. Cooper, 340 N.C. 242, 456 S.E.2d 514 (1995); Kath v. H.D.A. Entertainment, Inc., 120 N.C. App. 264, 461 S.E.2d 778 (1995); Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995); Jones v. Kearns, 120 N.C. App. 301, 462 S.E.2d 245 (1995); Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995); Sharp v. Gulley, 120 N.C. App. 878, 463 S.E.2d 577 (1995); Epps v. Duke Univ., Inc., 122 N.C. App. 198, 468 S.E.2d 846 (1996); Horton v. New S. Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, cert. denied, — N.C. —, 472 S.E.2d 8 (1996); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996); Moseley v. L & L Constr., Inc., 123 N.C. App. 79, 472 S.E.2d 172 (1996); Miller v. Brooks, 123 N.C. App. 20, 472 S.E.2d 350 (1996); Liberty Fin. Co. v. BDO Seidman, 123 N.C. App. 515, 473 S.E.2d 13 (1996); Baker v. Becan, 123 N.C. App. 551, 473 S.E.2d 413 (1996); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996); Askew Kawasaki, Inc. v. City of Elizabeth City, 124 N.C. App. 453, 477 S.E. 2d 85 (1996); Messer v. Town of Chapel Hill, 125 N.C. App. 57, 479 S.E.2d 221 (1996); Starco, Inc. v. AMG Bonding & Ins. Servs., Inc., 124 N.C. App. 332, 477 S.E.2d 211 (1996); Strickland v. Town of Aberdeen, 124 N.C. App. 430, 477 S.E.2d 218 (1996); Ware v. Fort, 124 N.C. App. 613, 478 S.E.2d 218 (1996); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997); Russell v. Adams, 125 N.C. App. 637, 482 S.E.2d 30 (1997); Town of Seven Devils v. Village of Sugar Mt., 125 N.C. App. 692, 482 S.E.2d 39 (1997); Mullis v. Sechrest, — N.C. App. —, 484 S.E.2d 423 (1997); Johnson v. Mayo Yarns, Inc., — N.C. App. —, 484 S.E.2d 840 (1997).

II. ANSWERS AND TIME THEREFOR.

Pre-answer motion to dismiss was not a responsive pleading within the confines of this rule, preventing the entry of default judgment pursuant to Rule 55 of the Rules of Civil Procedure. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

III. PRESERVATION AND WAIVER OF DEFENSES, GENERALLY.

A subsection 12(b) defense contained in an answer is not the same as a 12(b) defense raised in a motion, and affidavits filed in support of a 12(b) defense contained in an answer is not governed by the time constraints found in 1A-1, Rule 6(d). Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

Waiver of Venue in Custody and

Support Modification Proceeding. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. In such event, the district court in the improper county appropriately adjudicates the modification request. Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

IV. SUBJECT MATTER JURISDICTION.

And a motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner, etc. —

Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Failure to Comply with Requirements of § 1A-1, Rule 23(b) Not Jurisdictional Defect. — Although complaint, in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholders' derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Workers' Compensation Act Claims. — Where plaintiffs' complaint stated a claim exclusively compensable under the Workers' Compensation Act, the superior court was without subject matter jurisdiction to hear plaintiffs' claim. Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996).

V. PERSONAL JURISDICTION.

Motion to Dismiss for Lack of Personal Jurisdiction. — Motion to dismiss should have been granted to defendant, where court lacked authority to exercise personal jurisdiction over it. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

A general appearance will waive the right to challenge personal jurisdiction, etc. —

A general appearance by a party's attorney will dispense with process and service on the defendant; and the filing of an answer by the defendant's attorney, which does not include the defense of lack of personal jurisdiction, constitutes a waiver of this defense if the defense has not been raised in a prior motion. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), aff'd in part and rev'd in part, 342 N.C. 542, 467 S.E.2d 92 (1995).

General Appearance Not Shown. — Because the filing of the answer was entirely consistent with this section and because the record revealed that the plaintiffs were fully aware of the fact that the attorney signing the answer represented the insurance company, there arises no presumption that the attorney represented the defendant. Accordingly, the answer did not constitute a general appearance by the defendant, and the defendant was not precluded from later raising the defense of lack of personal jurisdiction. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), aff'd in part and rev'd in part, 342 N.C. 542, 467 S.E.2d 92 (1995).

VII. INSUFFICIENCY OF PROCESS.

Correctable Error. — Trial court erred in granting defendants' motion to dismiss pursuant to subdivisions (b)(4) and (5) as the designation of the incorrect county on the civil summons form was not a jurisdictional defect but rather an irregularity or error in form correctable by amending the summons in accordance with Rule 4(i). Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

VIII. INSUFFICIENCY OF SERVICE.

Where there was no valid service of process, the court acquired no jurisdiction, etc. —

Where the trial court record showed that plaintiff failed to request defendant's appearance in its Delayed Service of Complaint, the trial court found that no summons had ever been served on defendant and properly granted defendant's motion to dismiss. Hemmings v. Green, 122 N.C. App. 191, 468 S.E.2d 278 (1996).

IX. FAILURE TO STATE CLAIM.

A. In General.

Constitutional Issues. — To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

The essential question on a motion under subsection (b)(6), etc. —

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

Where loan between brothers was secured by deed of trust and son of borrower was made trustee, because of the close family relationships of the parties, the question of when lender knew or should have known of trustee's alleged breach of fiduciary duty was question for trier of fact, and lender's action against trustee was not subject to dismissal on borrower's and trustee's motion to dismiss alleging the action was time barred under subsection (b)(6) of this rule. Dawn v. Dawn, 122 N.C. App. 493, 470 S.E.2d 341 (1996).

Failure to State Claim May Be Asserted in Responsive Pleading or by Motion to Dismiss. —

In ruling upon a subdivision (b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

Allegations Treated as True. —

Where case was dismissed prior to trial pursuant to subdivision (b)(6), it is clear under North Carolina law that the court must treat the allegations of the complaint as true. Hickman ex rel. Womble v. McKoin, 337 N.C. 460, 446 S.E.2d 80 (1994).

Complaint Sufficient to Withstand Motion to Dismiss. — Where complaint alleged the existence of an employment contract containing a specific duration of employment, as it is well established that this type of employment contract is not terminable at will, and plaintiff was not permitted to complete the contract's stated duration of employment, the breach of contract claim as alleged in the complaint was sufficient to withstand defendant's subdivision (b)(6) motion to dismiss. Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994).

Plaintiff alleged sufficient facts in his complaint to state a claim for wrongful termination under the public policy exception to the employment at-will doctrine. Vereen v. Holden, 121 N.C. App. 779, 468 S.E.2d 471 (1996).

Where plaintiffs alleged facts sufficient to establish a prima facie case of negligence against town as well as sufficient to place plaintiffs' case within the "special duty" exception to the public duty doctrine and to withstand the town's defenses, the trial court erred by granting the town's motion to dismiss; complaint's factual allegations [e.g., that .4 mile from plaintiffs' burning house, fire chief decided to abandon plaintiffs' emergency call and instead ordered his crew to return to the fire station] were adequate to support a conclusion that fire chief's behavior was "malicious," "willful and wanton," or "outside of and beyond the scope of" his official duties as fire chief. Davis v. Messer, 119 N.C. App. 44, 457 S.E.2d 902 (1995).

Plaintiff, insurer of automobile which was pulling trailer, stated a claim for contribution against defendant, insurer of trailer involved in accident, where plaintiff acted in good faith in notifying defendant of claim and defendant was not prejudiced by delay in notice, and plaintiff acted to protect its own interest as insurer of automobile and was not a mere volunteer. Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 122 N.C. App. 449, 470 S.E.2d 556 (1996).

In a conversion action, owners of leased portable hangers stated claim based on city's taking control of hangers pursuant to a bankruptcy clause in the agreement, even though plaintiff owners ability to recover depended on whether the hangers were in fact "trade fixtures" and thus personalty or improvements affixed to the realty. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Facts alleging unfair claim settlement practices were sufficient to state a claim for unfair trade practices under § 58-63-15 so as to withstand a challenge under subdivision (b)(6) of this rule. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435

S.E.2d 537 (1993), cert. denied, 335 N.C. 770, 442 S.E.2d 519 (1994).

Allegations in amended complaint were sufficient to state a claim for relief based on a theory of negligence against an aircraft manufacturer in the preparation and publication of the information manual on mechanical functions. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Or Where Complaint Discloses Unconditional Affirmative Defense. —

Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where an affirmative defense is raised for the first time in a motion to dismiss under subsection (b)(6) of this rule, the motion must ordinarily refer expressly to the affirmative defense relied upon. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Absent a showing of prejudice, an affirmative defense may be raised by a Rule 12(b)(6) motion to dismiss. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where the nonmovant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion filed under subsection (b)(6) of this rule to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

A statute of limitations can be the basis for dismissal, etc. —

A statute of limitations defense is properly asserted in a motion to dismiss under subsection (b)(6). Horton v. Carolina Medicorp, Inc., 119 N.C. App. 777, 460 S.E.2d 567 (1995), rev'd on other grounds, 344 N.C. 133, 472 S.E.2d 778 (1996).

Appeal of Denial of Motion to Dismiss Heard. — Generally, the denial of a motion under subsection 12(b)(6) of this rule is interlocutory and not immediately appealable. However, where the court of appeals had proper jurisdiction over the other issues and because the parties desired an answer to a question which was fundamental in determining their rights, was also of public importance, and would aid State agencies in the performance of their duties, the court exercised its supervisory discretion to address on the merits the appeal. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Challenge to Congressional Redistricting Plan. — Action brought by the Republican Party of North Carolina, thirty registered Republicans, nine registered Democrats, and three citizens not affiliated with either party to challenge the State's federal congressional redistricting plan was dismissed with prejudice under Rule 12(b)(6) for failure to state a claim. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), aff'd, 506 U.S. 801, 113 S. Ct. 30, 121 L. Ed. 2d 3 (1992).

Failure to Allege Waiver of Immunity. — Where plaintiffs failed to allege in their complaint that defendant school board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort, plaintiffs' complaint failed to state a cause of action as to defendant school board. Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167, aff'd on rehearing, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, rehearing dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995).

Improper to Consider Statute of Frauds. —

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

A claim should be dismissed under this rule where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Review of Denial of Motion to Dismiss Not Available After Judgment on Merits. —

An unsuccessful movant under subsection (b)(6) of this rule may not seek review of denial of such motion on appeal from judgment on the merits against him. Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Claim for Concurrent Negligence. — For case holding plaintiff successfully stated a cause of action for concurrent negligence based upon the negligent acts of multiple defendants even though plaintiff could not allege which defendant had committed the injurious act, see McMillan ex rel. McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim Against Parents for Negligence in Giving Air Rifles to Children. — For case holding plaintiff successfully stated a claim for negligence against parents for giving air rifles to their minor children (where plaintiff's injury was sustained after being shot by one of the children), see McMillan ex rel. McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim for Failure to Follow Safety Requirements. — Where plaintiff alleged defendant was aware that the required safe methods for cleaning highly elevated windows were not being practiced, the defendant's management accepted and encouraged this fact, that defendant knew of supervisor's past record of ignoring safety requirements, and defendant had previously allowed exact cleaning job to be performed in the same inherently dangerous manner by this supervisor, these allegations were sufficient to state a legally cognizable claim that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

When Motion to Dismiss Converted, etc. —

In accord with sixth paragraph in main volume. See King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994).

When a trial court considers matters outside the pleadings, a motion under this rule is automatically converted into a motion for summary judgment. N.C. Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Inapplicable to Post-Trial Motions. — Motions under section (c) of this rule are pretrial motions requiring a review of the pleadings; they cannot be employed to test the validity of post-trial motions. Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

Movant Must Prove Entitlement, etc. —

In accord with third paragraph of the main volume. See Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

When Motion for Judgment on Pleadings Treated as Motion for Summary Judgment. — Where matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion for judgment on the pleadings was treated as if it were a motion for summary judgment. Helms v. Holland, 124 N.C. App. 629, 478 S.E.2d 513 (1996).

Motion for Judgment on the Pleadings Treated as (12)(b)(6) Motion. — Although respondent styled his motion as one for judgment on the pleadings pursuant to Rule 12(c), the court treated it as a motion for failure to state a claim because (1) the basis for the motion was that the petition failed to state sufficient facts as required by § 7A-289.25(6), and (2) a motion is treated according to its substance and not its label. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Refusal to Grant Judgment on Pleadings on Grounds of Governmental Immunity. — Although normally an appeal does not lie from the denial of a motion for judgment on the pleadings, an immediate appeal will lie under subsection (c), as well as subsection (b), where the trial court refuses to grant a judgment on the pleadings for the state on the grounds of governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Summary judgment improper where plaintiffs' claim raised a genuine issue as to defendant's negligence in the design and construction of a retaining wall, the necessary costs to remedy the defects and the appropriate damages by submitting affidavits and photographs in support of their claim, and defendant submitted no material beyond its pleadings. Floraday v. Don Galloway Homes, Inc., 340 N.C. 223, 456 S.E.2d 303 (1995).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

I. In General.
II. Counterclaims.
III. Crossclaims.

I. IN GENERAL.

Applied in United States Fire Ins. Co. v. Southeast Airmotive Corp., 102 N.C. App. 470, 402 S.E.2d 466 (1991); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993).

Cited in Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

II. COUNTERCLAIMS.

What Claims Must Be Asserted. — This rule requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a later action. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Where plaintiff proffered its counterclaims one year and three months after the filing of the complaint, by that time extensive discovery had already taken place, the new counterclaims would have required evidence of transactions which occurred three to five years earlier, and plaintiff sought to allege unfair and deceptive business practices for the first time, defendants were not to be penalized with more discovery and litigation and, for the first time, be exposed to treble damages because plaintiff was initially acting pro se and its first attorney was dilatory. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Counterclaims were compulsory where they arose out of business dealings of the parties covering over a two-year period and the expenditure of over one million dollars, and where defendants conceded that the counterclaims were compulsory in their brief by stating that they "arise out of the same series of transactions as the claims in the original complaints," and that "a reasonable person would have brought all of the claims on the original complaints." House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Voluntary Dismissal of Compulsory Counterclaim as Bar to Later Suit. — Plaintiff may not maintain action on a claim which was a compulsory counterclaim in a prior lawsuit and on which plaintiff took a voluntary dismissal. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

This rule and the doctrine of res judicata would be completely undermined if parties were allowed to voluntarily dismiss and then later re-file compulsory counterclaims. The judicial economy promoted by this rule would be lost. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Claims Dismissed to Permit Joinder as Counterclaims in Pending Action. — Where suits were logically related, the same parties were involved, the issues arose out of the same agreement, and both suits occurred because of the same set of circumstances, plaintiff failed to demonstrate that any of his rights would be jeopardized if the issues were adjudicated in a single action; therefore, plaintiff's claims for monetary and injunctive relief should have been raised as a compulsory counterclaim in previously filed declaratory judgment action, and plaintiff's action should have been dismissed without prejudice to file these claims as a counterclaim in the pending action. Stevens v. Henry, 121 N.C. App. 150, 464 S.E.2d 704 (1995).

III. CROSSCLAIMS.

Class Action Crossclaim. — The class of plaintiffs was entitled as a matter of law to proceed against impleaded defendant because plaintiffs' crossclaim related to the subject matter of the action and because the crossclaim merely realleged claims which the court found to be appropriate for class action procedure. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994).

Rule 14. Third-party practice.

CASE NOTES

Dismissal of Third-Party Complaint. — In divorce action where husband filed an answer in which he asserted a counterclaim against wife and a third-party complaint against third-party defendant bank and where he alleged that wife fraudulently obtained an equity line of credit from the bank, secured by a deed of trust on the marital home, without his knowledge and consent and through his forged signature which was purportedly "witnessed" by bank employees, the court did not err in dismissing the third-party complaint; wife's claims against husband were for an absolute divorce and for an equitable distribution of the marital property, and the bank could not be held liable to husband should an absolute divorce be granted; if the transaction resulting in the deed of trust is found to have been entered into without husband's consent and knowledge, the debts secured by the deed of trust would be held to be separate to wife; any misconduct by wife affecting the value of the property would also be considered in distributing the property. McCollum v. McCollum, 102 N.C. App. 347, 401 S.E.2d 773 (1991).

Cited in Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990); Dick Parker Ford, Inc. v. Bradshaw, 102 N.C. App. 529, 402 S.E.2d 878 (1991).

Rule 15. Amended and supplemental pleadings.

Legal Periodicals. — For survey, "Rule 15(c) and the Relation Back of Corrected Party Names," see 73 N.C.L. Rev. 2189 (1995).

For article, "Crossman v. Moore: The End of Relation Back with Regard to Corrected Party Names in North Carolina", see 74 N.C.L. Rev. 2000 (1996).

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.
III. Relation Back of Amendments.
IV. Supplemental Pleadings.

I. IN GENERAL.

As a general rule, once judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under § 1A-1, Rule 59 or § 1A-1, Rule 60. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Issue Tried by Implied Consent of Parties Though Not in Pleadings. — In case alleging retaliatory discharge where both parties introduced a considerable amount of evidence regarding the financial condition of defendant and its relation to the termination of plaintiff's employment, the financial hardship issue was tried by the implied consent of the parties and should have been treated as if it was raised in the pleadings. Johnson v. Friends of Weymouth, Inc., 120 N.C. App. 255, 461 S.E.2d 801 (1995).

Justification for Denial of Motion to Amend. — Reasons justifying denial of a motion to amend include (a) undue delay, (b) undue prejudice, and (c) futility of amendment. Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Six Months Delay Too Long to Amend Name. — When, after being informed by named defendant that they were not the proper defendant, plaintiffs waited over six months to file amended complaint, defendant properly asserted the statute of limitations as a bar to plaintiffs' effort to correct the name of the party already in court. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

Failure to Make Motion in Timely Fashion. — Trial court did not err in denying plaintiffs' motion to amend their complaint where plaintiffs knew of the purchase of insurance for nearly two and a half years, and failed to amend their complaint to allege this until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead. Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, cert. dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995).

Amendment to Add Defense. — Trial court did not err by allowing defendants to amend their respective answers to add defense that renewal insurance policy gave insufficient notice. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Amendment to add a § 58-63-15(11) claim was denied where it was not shown that defendant understood the alleged extraneous evidence was aimed at establishing a violation of § 58-63-15(11) rather than proving an issue actually raised by the pleadings. Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Burden of Party Objecting to Amendment. — The party objecting to the amendment has the burden of establishing it will be materially prejudiced by the amendment. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Plaintiffs Should Have Sought Leave to Amend Although Claim Raised in Answer. — Where the essence of plaintiffs' complaint and amended complaint was that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the bond resolution, namely for purchase and renovation of the Square D facility, and where neither complaint included an allegation that monies from other sources of revenue were improperly diverted, although defense, asserted in the answer of the Board of Education defendants, raised a claim of misappropriation of revenues other than bond proceeds, the trial court did not err in limiting denial of defendants' motions to dismiss to only the allegations relating to the propriety of the expenditure of school bond proceeds on the Square D facility; if plaintiffs desired to add a claim that defendants diverted sources of revenue other than school bond proceeds, plaintiffs should have sought leave to amend under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Discretion of Court. — Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the court and is accorded great deference. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Court's Ruling Not Reviewable Absent Showing of Abuse. —

A motion to amend is addressed to the discretion of the trial court and is not reviewable on appeal absent a showing of abuse of discretion. DOT v. Bollinger, 121 N.C. App. 606, 468 S.E.2d 796 (1996).

Trial court's denial of plaintiff's motion to amend upheld. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Denial of Defendants' Motion to Amend Answer. — Where defendants moved to amend their answer almost a full year from filing it and after both parties had conducted extensive discovery, and where, if the trial court had allowed amendment, plaintiffs would have been required to produce evidence of party's negligence approximately five years after the accident, at least on grounds of defendants' undue delay and undue prejudice to plaintiffs, the trial court was justified in denying defendants' motion to amend their answer. Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

The trial court did not err by denying the plaintiffs' motion, etc. —

Where motion to amend was filed over a year after the original complaint, and the requested amendment purported to add a seventh cause of action, but the cause of action was ambiguous and no relief was requested, the trial court did not abuse its discretion in denying the motion to amend the complaint. Outer Banks Contractors v. Daniels & Daniels Constr., Inc., 111 N.C. App. 725, 433 S.E.2d 759 (1993).

Where insufficient evidence existed to support defendant's claim, allowing defendant to amend its pleadings to include such a claim would be futile, the trial court did not err in denying defendant's motion to amend. IRT Property Co. v. Papagayo, Inc., 112 N.C. App. 318, 435 S.E.2d 565 (1993), rev'd on other grounds, 338 N.C. 293, 449 S.E.2d 459 (1994).

Motion to Amend Denied. — Superior court did not abuse its discretion in denying defendants' motion to amend their answer to interpose two new defenses where the motion to amend was filed more than five years after the compliant was filed. Isenhour v. Universal Underwriters Ins. Co., 345 N.C. 151, 478 S.E.2d 197 (1996).

Applied in County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990); Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993); Coble Cranes & Equip. Co. v. B & W Utils., Inc., 111 N.C. App. 910, 433 S.E.2d 464 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995); Sykes v. Keiltex Indus., Inc., 123 N.C. App. 482, 473 S.E.2d 341 (1996).

Quoted in Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C. App. 428, 396 S.E.2d 815 (1990); Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991); Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996).

Cited in Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653 (1994); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994); Denning-Boyles v. WCES, Inc., 123 N.C. App. 409, 473 S.E.2d 38 (1996); Webster Enters., Inc. v. Selective Ins. Co., 125 N.C. App. 36, 479 S.E.2d 243 (1996).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Party who fails to object to evidence, etc. —

Where one of the "new" issues in an amended complaint was sufficiently pled in the complaint, defendant had notice and could not complain of its amendment; where evidence sustaining the other issues in the complaint did not tend to support any properly pled issue and because defendant never specifically objected to that evidence as being outside the scope of the pleadings, he impliedly consented to trial on those issues. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Where there was no warning in the complaint of a punitive damages claim, and no consent by defendant to such a claim, it was within the discretion of the trial court to deny plaintiff's motion to amend to add a claim for punitive damages based upon gross negligence. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 649, aff'd, per curiam, 342 N.C. 406, 464 S.E.2d 298 (1995).

III. RELATION BACK OF AMENDMENTS.

This rule does not apply to the naming of a new party-defendant to an action; it is not authority for the relation back of a claim against a new party. Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995).

Amendment of Date Permitted. — Where both the original and amended complaints allege that plaintiff was injured in a collision between a vehicle driven by defendant and another vehicle in which plaintiff was a passenger, aside from the changes made by the first amended complaint, the only difference between the original and the second amended complaint is the year in which the accident occurred and that is sufficient to give the notice called for by Rule 15(c). Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Relation Back Denied. — Trial court did not err in refusing to allow relation back of a complaint where the proper party did not know that, but for a mistake concerning identity, the action would have brought against him within the period prescribed by law. Crossman v. Moore, 115 N.C. App. 372, 444 S.E.2d 630 (1994), aff'd, 341 N.C. 185, 459 S.E.2d 715 (1995).

Plaintiff's amended complaint did not relate back to the date of the original complaint, because the plaintiff failed to establish that the added parties received notice or should have known of the action against them within the limitation period. Stewart Enters. v. MRM Constr. Co., 116 N.C. App. 604, 449 S.E.2d 20 (1994).

Since amendment to complaint could not relate back to the original pleading, plaintiffs' claim against hospital was barred by the statute of limitations. Medford v. Haywood County Hosp. Found., 115 N.C. App. 474, 444 S.E.2d 699, cert. granted, 337 N.C. 802, 449 S.E.2d 747 (1994).

Because subsection (c) of this rule allows the addition of new claims, but not new parties, plaintiff's additional claims against city and it's officers in their official capacities did not relate back and did not take on the filing date of original complaint. Rogerson v. Fitzpatrick, 121 N.C. App. 728, 468 S.E.2d 447 (1996).

Amendment to Adoption Petition Held Not to Relate Back. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, was filed with an adoption petition in lieu of the affidavit required by § 48-13, a subsequently filed affidavit did not relate back to the original filing date of the petition so as to cut off the rights of the putative father who filed a legitimation petition to § 49-10 before the affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

IV. SUPPLEMENTAL PLEADINGS.

Supplemental Pleading to Show Change in Capacity in Which Plaintiff Sues. —

Where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action. Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Names of Witnesses and List of Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under 1A-1, Rule 26(b)(4), a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through a pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Cited in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* — Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.* —

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. —

Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Sessions Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be

represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.* — When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.* — When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.* — Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

CASE NOTES

I. In General.
II. Real Party in Interest.
III. Infants and Incompetents.

I. IN GENERAL.

Applied in Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Lawrence v. Wetherington, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

Stated in Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476 (1993).

Cited in Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

II. REAL PARTY IN INTEREST.

Standing of Association to Bring Suit. — An association may properly bring suit only if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

Homeowner's Associations. — Where plaintiff homeowner's association instituted litigation in its own name as allowed under § 47C-3-102, but the plaintiff had actually been incorporated under the Unit Ownership Act, which required that litigation be instituted by the board of directors or manager, and plaintiff had three months to attempt to substitute the real party in interest but failed to do so, the plaintiff had no standing to bring the action. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

III. INFANTS AND INCOMPETENTS.

Substitution as Party Plaintiff. — Where the real party in interest was a minor, and the record did not show that a guardian had been appointed, the action should not have been dismissed, but the real party must be given a reasonable opportunity to be substituted as a party plaintiff. Freeman v. Blue Cross & Blue Shield, 123 N.C. App. 260, 472 S.E.2d 595 (1996).

The statute does not require, nor does it imply that it is the respondent's responsibility to ask for appointment of the guardian ad litem. Richard v. Michna, 110 N.C. App. 810, 431 S.E.2d 485 (1993).

Appeal from Order Appointing Guardian Ad Litem. — Plaintiff gave notice of appeal from an interlocutory order, namely, one granting defendant's motions for the appointment of a guardian ad litem. As this order was not a final judgment, for plaintiff to have been entitled to appeal of right from the order, plaintiff was required to establish that the order either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Standing to Challenge Appointment on Appeal. — Because he was not an aggrieved party, plaintiff had no standing to challenge on appeal trial court's order appointing a guardian ad litem for defendant. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

A guardian ad litem must always be appointed for a minor child in a termination, etc. —

In accord with the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Fees of Guardian ad Litem Properly Taxed as Costs. — Having properly appointed guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997).

Rule 18. Joinder of claims and remedies.

CASE NOTES

Stated in Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

Cited in Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, reh'g denied, 331 N.C. 558, 418 S.E.2d 664, cert. denied, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Who Are Necessary Parties. —

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996).

Proper Parties May Be Joined. —

Sisters, although united in interest with their brother in trust estate, were proper, not necessary, parties and did not have to be joined in his claim against decedent's estate for his alleged breach of his fiduciary duty as trustee. Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

Absence of necessary party does not merit dismissal. The absence of a necessary party under this rule does not merit dismissal of the action. City of Albemarle v. Security Bank and Trust Co., 106 N.C. App. 75, 415 S.E.2d 96 (1992).

Husband of plaintiff in paternity suit was not a necessary party where a court had previously determined that he was not the father. Only the interests of the defendant, the alleged father, would be directly affected by the outcome of the litigation. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession could not be resolved without the joinder of the grantor or his heirs, who retained fee title to the soil, and the record owners of lots in the subdivision, who had user rights in the easement. Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

The note above has been set out to correct a typographical error in the main pamphlet.

Lessor, Rather Than Assignee of Lease, Held to Be Real Party in In-

terest in Action Against Lessees. — Language of an assignment of a lease clearly established that lessor assigned only the right to rent payments, and plaintiff retained all other rights under the lease, including right to enforce lessees' tax obligation under lease; thus, the lessor was a real party in interest in action against lessees who defaulted under lease. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Since assignee of lease received no right in the assignment to collect taxes from lessees, assignee's presence in the case brought by assignor/lessor against lessee for failure to pay taxes under lease was not necessary for a complete determination, and any judgment entered could not prejudice either assignees or the lessees. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Applied in Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990); Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Quoted in West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

Cited in Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

Rule 20. Permissive joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990).

Stated in Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460 (1993).

Rule 23. Class actions.

Legal Periodicals. —

For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporations Act," see 68 N.C. L. Rev. 1091 (1990).

CASE NOTES

I. In General.

I. IN GENERAL.

Federal Rules and Cases. — Both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure contain a requirement that the complaint initiating a shareholder derivative action be verified under oath. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because the present federal rule and its predecessors (which also contained a verification requirement) have been interpreted and discussed widely, the Supreme Court will turn to federal cases to elucidate the purpose behind this requirement. Certain aspects of this rule and the procedures in North Carolina governing derivative suits may differ from the federal approach; however, insofar as the purposes of certain of the federal and State rules are congruent, cases explaining federal rules are helpful. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

This rule should receive a liberal construction, etc. —

In accord with main volume. See Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993).

The requirements for a class action, etc. —

In accord with the main volume. See Perry v. Union Camp Corp., 100 N.C. App. 168, 394 S.E.2d 681 (1990).

Court Must Make Findings of Fact Regarding Class Certification. — Findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard. Such findings must be made with sufficient specificity to allow effective appellate review. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Plaintiffs were entitled to proceed as a class against corporate purchaser on the claims contained in the original complaint because the transfer occurred after the court certified the action as a class action, they had knowledge of the claims being asserted against seller at the time the transfer was made, and as transferee of all the assets, purchased the contracts which were the subject matter of the plaintiffs' original complaint. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994).

Court Supervision of Communications With Potential Class Members Not Abuse of Discretion. — In a class action challenging interest rates that were charged in financing the purchase of mobile homes, trial court did not abuse its discretion in supervising communications with potential class members, as the trial court did not allow unlimited unsupervised communications with potential class members and restricted contact to the level it deemed appropriate at that stage of litigation. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Notice to Members of Class Required. —

The North Carolina Supreme Court has held that fundamental fairness and due process require that adequate notice be given to the members of a class. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

An order denying certification of a class action is appealable. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

While an order denying a class certification is interlocutory, it is nonetheless immediately appealable as it affects a substantial right of the unnamed plaintiffs. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Review of Order Denying Class Certification. — The decision to grant or deny class certification rests within the sound discretion of the trial court; therefore, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion. In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Certification of Class Held Proper. — The trial court properly certified suit as a class action where the class was divided into six subclasses, three of these consisting of living persons who retired as vested members of the Retirement System, and three of these subclasses consisting of living beneficiaries, heirs, or personal representatives of persons comprising the first three subclasses in an action regarding calculation of disability payments. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40), this rule, and § 1A-1, Rules 12 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Verification Requirement Not Jurisdictional. — Although complaint in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Where Purposes of Verification Requirement Have Been Met. — Because this rule's verification requirement is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Defendants waived their objection to lack of proper verification in shareholders' derivative suit by failing to raise the issue of verification until the fourth time the case was heard in the appellate division. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because defendants raised the verification issue for the first time in appellate briefs before the Supreme Court, over seven years after the complaint was filed, and after many years of active litigation of the suit, defendants waived their right to complain about verification. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Class Based on Underpayment of Benefits. — A class was established where each of the parties had a claim based on contentions of underpayment of retirement benefits, and this claim predominated over issues affecting only individual class members. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Quoted in In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Cited in Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991); Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996); Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 481 S.E.2d 334 (1997).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Motion for Intervention Denied. — Where claimants to client security fund did not have an interest in the funds held by the trustee/conservator, the trial properly denied motion for intervention. In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130, cert. denied, 337 N.C. 801, 449 S.E.2d 571 (1994).

Declaratory Judgment Actions. — The trial court erred by denying a motion to intervene in a declaratory judgment insurance coverage action which was filed by the plaintiff in an underlying tort action. United Servs. Auto. Ass'n v. Simpson, — N.C. App. —, 485 S.E.2d 337 (1997).

Applied in State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992); Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Stated in State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992).

Cited in Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

CASE NOTES

I. In General.

I. IN GENERAL.

Stated in Buie v. High Point Assocs. Ltd. Partnership, 119 N.C. App. 155, 458 S.E.2d 212 (1995).

Cited in Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Farm Credit Bank v. Edwards, 121 N.C. App. 72, 464 S.E.2d 305 (1995).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

Cross References. — As to time for beginning and completing discovery, see Gen. Rules Proc., Rule 8, in the Annotated Rules of North Carolina.

Legal Periodicals. —

For article, "Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking," see 69 N.C.L. Rev. 795 (1991).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.
II. Scope of Discovery Generally.
V. Protective Orders.

I. IN GENERAL.

The purpose and intent of this rule, etc. —

The purpose behind section (e) of this rule is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

The imposition of sanctions under § 1A-1, Rule 37, etc. —

In accord with the main volume. See Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Failure to Address Claims of Privilege. — Trial judge erred in releasing documents to the plaintiffs without addressing the defendant's Rule 26(b) claims of privilege. Hall v. Cumberland County Hosp. Sys., 121 N.C. App. 425, 466 S.E.2d 317, cert. denied, 343 N.C. 122, 468 S.E.2d 780 (1996).

Sanction for Taking Deposition in Violation of Rules. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Sanctions for Improper Discovery. — A motion under the more specific rule governing sanctions in the context of discovery responses is the proper avenue for sanctioning improper conduct relative to discovery. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions Under Subsection (g). — The imposition of sanctions for discovery abuses under subsection (g) informs offending counsel of exactly what action is being sanctioned. This process alleviates any due process concerns an attorney might raise by claiming not to know which of his or her actions merit sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Applied in Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Stated in Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993).

Cited in Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993); Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994); Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997).

II. SCOPE OF DISCOVERY GENERALLY.

The relevancy test for discovery, etc. —

The test of relevancy under subsection (b) of this rule differs from the more stringent test of relevancy under § 8C-1, Rule 401. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

Records Irrelevant for Discovery

Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

The determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Discovery Plan Required for Discovery Conference. — While § 1A-1, Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, court is not obligated to impose discovery plan if no discovery conference has been held. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Other Witnesses and Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under the provisions of subdivision (b)(4) of this rule, a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through the pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Accident Reports. — Accident report was held to be discoverable. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

Defendant hospital's accident reporting policy existed to serve a number of nonlitigation, business purposes which imposed a duty on employees to report any extraordinary occurrences within the hospital to risk management; thus, absent any salient facts, it could not be said that hospital employee prepared accident report because of the prospect of litigation. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

V. PROTECTIVE ORDERS.

Nullified by Dismissal. — Where plaintiff entered a dismissal in her action for claim and delivery, her argument that trial court erred in entering protective order concerning possession was moot, as the protective order was nullified by plaintiff's dismissal. Doe v. Duke Univ., 118 N.C. App. 406, 455 S.E.2d 470 (1995).

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* — Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In foreign countries.* — Depositions may be taken in a foreign country:

(1) Pursuant to any applicable treaty or convention;
(2) Pursuant to a letter of request, whether or not captioned a letter rogatory;
(3) On notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States; or

(4) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in (here name the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because the testimony was not taken under oath, or any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* — No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree otherwise by stipulation as provided in Rule 29.

(d) *Depositions to be used outside this State.* —

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules 30(b), 30(d), and 45(b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1995, c. 389, s. 4.)

Legal Periodicals. — For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

Cited in Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993); Metropolitan Property & Cas. Ins. Co. v. Lindquist, 120 N.C. App. 847, 463 S.E.2d 574 (1995); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (1996); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45, provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to subsection (b)(1) of this rule. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; place of examination; special notice; nonstenographic recording; production of documents and things; deposition of organization.* —

(1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:

A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he resides or within 50 miles of the place of service except that a judge, as defined by subdivision (h) of this rule, may, upon motion showing good cause, require that a party who selected the county where the action is pending as the forum for the action or an officer, director or managing agent of such a party, or a person designated pursuant to subsection (b)(6) hereof to testify on behalf of such a party present himself for the taking of his deposition in the county where the action is pending. The judge upon granting the motion may make any other orders allowed by Rule 26(c) with respect thereto, including orders with respect to the expenses of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of the county where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Unless the court orders otherwise, testimony at a deposition may be recorded by sound recording, sound-and-visual, or stenographic means. If the testimony is to be taken by other means in addition to or in lieu of stenographic means, the notice shall state the methods by which it shall be taken and shall state whether a stenographer will be present at the deposition. In the case of a deposition taken by stenographic means, the party that provides for the stenographer shall provide for the transcribing of the testimony taken. If the deposition is by sound recording only, the party noticing the deposition shall provide for the transcribing of the testimony taken. If the deposition is by sound-and-visual means, the appearance or demeanor of deponents or attorneys shall not be distorted through camera techniques. Regardless of the method stated in the notice, any party or the deponent may have the testimony recorded by stenographic means.

(5) A party deponent, deponents who are officers, directors or managing agents of parties and other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may not be served with a subpoena duces tecum, but

the notice to a party for the deposition of such a deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34, except as to time for response, shall apply to the request. When a notice to take such a deposition is accompanied by a request made in compliance with Rule 34 the notice and the request must be served at least 15 days earlier than would otherwise be required by Rule 30(b)(1), and any objections to such a request must be served at least seven days prior to the taking of the deposition.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. It shall not be necessary to serve a subpoena on an organization which is a party, but the notice, served on a party without an accompanying subpoena shall clearly advise such of its duty to make the required designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; oath; objections.* — Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The person before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to any limitations imposed by orders entered pursuant to Rule 26(c) or 30(d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party who served the notice of taking the deposition, and he shall transmit them to the person before whom the deposition is to be taken who shall open them at the deposition, propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to deponent; changes; signing.* — The sound-and-visual recording, or the transcript of it, if any, the transcript of the sound recording, or the transcript of a deposition taken by stenographic means, shall be submitted to the deponent for examination and shall be reviewed by the deponent, unless such examination and review are waived by the deponent and by the parties. If there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. The person administering the oath shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent. The certificate shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the certificate is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the certificate and state on the certificate the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though the certificate were signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by person administering the oath; exhibits; copies; notice of filing.* —

(1) The person administering the oath shall certify that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. This certificate shall be in writing and accompany the sound-and-visual or sound recording or transcript of the deposition. He shall then place the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall personally deliver it or mail it by first class mail to the party taking the deposition or his attorney who shall preserve it as the court's copy.

Documents and things produced for inspection during the examination of the deponent shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (i) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the person before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the person administering the oath shall furnish a copy of the deposition to any party or to the deponent.

(3) The clerk shall give prompt notice of the filing of a deposition to all parties.

(g) *Failure to attend or to serve subpoena; expenses.* —

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Judge; definition.* —

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1; 1973, c. 828, s. 1; c. 1126, ss. 1, 2; 1975, c. 762, s. 2; 1977, c. 769; 1983, c. 201, s.

2; c. 801, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1037, s. 42; 1995, c. 353, ss. 1-3; 1995 (Reg. Sess., 1996), c. 742, s. 4.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "means" for "means ethods" in the first sentence of subdivision (b)(4).

Legal Periodicals. —

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.

I. IN GENERAL.

Jurisdiction of Court. — District Court was without jurisdiction, pending the appeal, to find deponent in contempt of the order appealed from; thus, its findings and order to that effect were void. Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996).

Rule 32. Use of depositions in court proceedings.

Legal Periodicals. —

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

Deposition of Non-Party Witness. — To be admissible at trial, the deposition of an unavailable non-party witness must meet the requirements of both this Rule and N.C.R. Evid. 804(b)(1). Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995).

Use of Depositions at Trial Stage Limited. —

Oral testimony is more desirable, but a deposition may be used if a witness is unavailable. Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992).

There is no distinction between a discovery deposition and a trial deposition, under this rule. Robertson v. Nelson, 116 N.C. App. 324, 447 S.E.2d 488 (1994).

Admittance of Portion of Deposition Does Not Require Admittance of Entire Deposition. — Trial court did not err in allowing in evidence selected portions of each of the two plaintiffs' depositions and in overruling plaintiffs' motions that the entire depositions be admitted. Plaintiffs' reliance on this section was misplaced since plaintiffs alleged a right to have the entire depositions admitted once a portion had been offered into evidence; this section allows the admission of "any other part which is relevant to the part introduced." Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Incarcerated Parent in Parental Termination Proceeding. — When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Insufficient Evidence of Witness's Illness. — Party's attorney failed to offer sufficient proof of a witness's alleged illness, and the trial court did not abuse its discretion in refusing to admit testimony under subdivision (a)(4), where the attorney orally stated that he had received the information that witness was ill from the witness's wife over the telephone, and offered no other form of proof concerning the alleged illness. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Judicial Notice of Distance Between Cities Not Required. — Where an attorney sought to have a deposition admitted pursuant to subdivision (a)(4) of the Rules of Civil Procedure by asserting that the witness was more than 100 miles from the place of trial, the trial court did not abuse its discretion by declining to take judicial notice of the distance between two cities. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Cited in Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991).

Rule 33. Interrogatories to parties.

CASE NOTES

Cited in Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Asserting Work Product Privilege Insufficient Without Written Objection or Protective Order. — Assertion by counsel of a work product privilege to the tapes and transcripts was insufficient to meet the requirements of this rule where he did not file a written objection nor seek a protective order, and his failure to do either entitled the opposing party to proceed under Rule 37(d). Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

Applied in Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

Cited in Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

Failure to Respond to Plaintiff's Request. — By failing to respond to plaintiff's request for admissions, defendants allowed the facts in question to be judicially established. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Admission Sufficient to Support Summary Judgment. — When facts are admitted pursuant to subsection (b), these facts have been held to be sufficient to support a grant of summary judgment. Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59 (1996).

Use of Admission. — Subsection (b) is clear in its mandate that admissions made in one action may not be used against the party who made them in any other proceeding outside of the one pending. Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59 (1996).

Quoted in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

Cited in McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995); Rahim v. Truck Air of Carolinas, Inc., 123 N.C. App. 609, 473 S.E.2d 688 (1996).

Rule 37. Failure to make discovery; sanctions.

Legal Periodicals. —
For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Not every abuse of discovery merits imposition of punitive sanctions. Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995), aff'd, 344 N.C. 153, 472 S.E.2d 774 (1996).

Information Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

Responding Party May Not Unilaterally Interpret Relevant Scope. — The responding party may not unilaterally "interpret" the relevant scope of its response and only provide that information it considers discoverable. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

The trial judge has broad discretion, etc. —
The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions such as striking answers and/or counterclaims and awarding attorney fees are well within the court's discretion in cases involving a refusal to respond to discovery requests and a refusal to obey an order to compel discovery. Kewaunee Scientific Corp. v. Eastern Scientific Prods., Inc., 122 N.C. App. 734, 471 S.E.2d 451 (1996).

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under subsection (d) of this rule. Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

Sanctions Imposed on Attorney. — Trial court was justified in imposing sanctions on attorney where notice of plaintiff's deposition was actually sent to her office, and court of appeals could only assume that plaintiff was unaware that she needed to bring any documents with her because her counsel never informed her of such. Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

The proximity of the discovery abuse to the date of trial is one factor the trial court may consider when determining whether or not to award sanctions. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Party Not Precluded from Presenting Witnesses and Exhibits at Trial. — Where plaintiff, in a deposition, specifically requested from the defendant the names of his trial witnesses and a list of his trial exhibits, but made no showing that he had a special need for defendant's list of witnesses and exhibits ten months prior to trial, the information sought was not discoverable and defendant's failure to provide such information could not preclude him from presenting witnesses and exhibits at the trial. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Movant Need Not Show Prejudice to Obtain Sanctions. — This rule does not require the movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Default Judgment. — Under this rule, where an answer to the complaint has been filed, and a party fails to answer requested discovery, the opposing party may move the court to order the answer stricken, and if granted, for entry of default judgment against the disobedient party. O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

Rule Inapplicable to Requests for Protective Order. — This rule was inapplicable to plaintiff's request for sanctions because plaintiff did not compel discovery, but instead sought to prevent discovery by asking for a protective order. Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

Where plaintiff did not produce medical records, defendants were entitled to attorney's fees unless plaintiff proved such an award was unjust under the circumstances. Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996).

Findings of Fact Required. — Where the Industrial Commission made none of the four required findings before denying sanctions, it abused its discretion. Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Abuse of Discretion for Failing to Impose Sanctions. — The Industrial Commission abused its discretion by failing to impose sanctions because representation for both parties was publicly funded and plaintiff did not personally incur any additional expense due to the omissions of which he complained. Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Prohibiting Introduction of Evidence as Sanction. — The sanction provision of this rule permits the court to make such orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Motion for Sanctions to Preceed Late Discovery Responses. — The untimely service of discovery responses cannot support sanctions if the discovery responses are served prior to the making or service of a motion requesting sanctions. Thus, untimely discovery responses served after the service of a motion seeking sanctions on this basis can support sanctions. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Where the plaintiff's untimely responses to discovery requests were served on the same day that the defendants served or made their motion for sanctions, the trial court had authority to enter sanctions for the untimely discovery responses. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Dismissal Upheld. —

Where the plaintiff never objected to discovery requests, obtained one extension of time to comply but failed to respond within the extended time, and failed to request an additional extension and, it was determined that plaintiff had established a pattern of disregarding due dates for responding to discovery, the decision of the trial court to dismiss the complaint was not manifestly unsupported by reason. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Sanction Overturned Only for, etc. —

Sanctions under this rule are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion. Hursey v. Homes By Design, Inc., 121 N.C. App. 175, 464 S.E.2d 504 (1995).

A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. Hursey v. Homes By Design, Inc., 121 N.C. App. 175, 464 S.E.2d 504 (1995).

Trial court abused its discretion when it decided to remit a portion of the verdict rather than granting the defendants' motion for a new trial based on the plaintiff's failure to comply with discovery requests. Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996).

Where plaintiff made a request for costs and asserted that appeal was in violation of Rule 11, but did not make the request in a motion, pursuant to this rule, the court declined to consider the request. Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 473 S.E.2d 638 (1996).

Applied in Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Smitheman ex rel. Godwin v. National Presto Indus., Inc., 109 N.C. App. 636, 428 S.E.2d 465 (1993); Moore v. Sullivan, 123 N.C. App. 647, 473 S.E.2d 659 (1996).

Quoted in In re Vestal, 104 N.C. App. 739, 411 S.E.2d 167 (1991).

Cited in Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993); Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

A party may waive his right to jury trial, etc. —
Where defendant first requested a jury trial almost eleven months after he served his answer, the last pleading filed in the case, defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right. Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796, cert. denied, 338 N.C. 524, 453 S.E.2d 170 (1994).

Stated in Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993).

Cited in Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993).

Rule 39. Trial by jury or by the court.

(a) *By jury.* — When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) *By the court.* — Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.* — In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47(a). (1967, c. 954, s. 1.)

Editor's Note. —
This section is set out in the supplement to correct an error in the main pamphlet.

Rule 40. Assignment of cases for trial; continuances.

(a) The senior resident superior court judge of any superior court district or set of districts as defined in G.S. 7A-41.1 may provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district or set of districts.

Calendaring of actions for trial in the district court shall be in accordance with G.S. 7A-146. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission. (1967, c. 954, s. 1; 1969, c. 895, s. 9; 1985, c. 603, s. 8; 1987 (Reg. Sess., 1988), c. 1037, s. 43; 1997-34, s. 10.)

Effect of Amendments. — The 1997 amendment, effective April 23, 1997, substituted "Assembly or the Rules Review Commission" for "Assembly" in subsection (b).

CASE NOTES

I. In General.
II. Calendaring of Actions.

I. IN GENERAL.

Applied in Alexander v. Wilkerson, 99 N.C. App. 340, 392 S.E.2d 765 (1990); Bowers v. Olf, 122 N.C. App. 421, 470 S.E.2d 346 (1996); Bowers v. Olf, 122 N.C. App. 421, 470 S.E.2d 346 (1996).

Stated in Broome v. Broome, 112 N.C. App. 823, 436 S.E.2d 918 (1993).

II. CALENDARING OF ACTIONS.

The senior Superior Court judge "may provide by rule for the calendaring of actions for trial in the superior court division . . .". Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as a sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file the consent order would result in the imposition of sanctions. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Rule 41. Dismissal of actions.

CASE NOTES

I. In General.
II. Voluntary Dismissal.
III. Involuntary Dismissal.
  A. In General.
  B. Failure to Prosecute or to Comply with Rules or Orders.
  C. Failure to Show Right to Relief.
IV. Costs.

I. IN GENERAL.

Legislative Intent. — The intent of subdivision (a)(1) is to protect a defendant from the harassment of repetitive lawsuits. Richardson v. McCracken Enters., — N.C. App. —, 485 S.E.2d 844 (1997).

In enacting the two dismissal provisions of subdivision 9a(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts. Richardson v. McCracken Enters., — N.C. App. —, 485 S.E.2d 844 (1997).

Dismissal Order Binding on Defendant. — Because defendant did not appeal the trial court's dismissal order which allowed plaintiff an additional year in which to refile, he was bound by that order and he could not attack the trial court's dismissal order collaterally by appealing the final judgment entered after plaintiff refiled. Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

Dismissal under subsection (a) of this rule strips the trial court of authority to enter further orders in the case, except as provided by subsection (d) of this rule, which authorizes the court to enter specific orders apportioning and taxing costs. Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

Adversary Proceedings Terminated. — Where plaintiff's attorney validly took a voluntary dismissal in open court before defendants asserted any counterclaim, plaintiff terminated all adversary proceedings. Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

Requirement of Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385 (1991); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993); In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993); Moore v. Pate, 112 N.C. App. 833, 437 S.E.2d 1 (1993); Pine Knoll Ass'n v. Cardon, — N.C. App. —, 484 S.E.2d 446 (1997).

Quoted in Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

Cited in Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991); Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611 (1991); Brockwell v. Lake Gaston Sales & Serv., 105 N.C. App. 226, 412 S.E.2d 104 (1992); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993); Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167, aff'd on rehearing, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, rehearing dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995); Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); Devane ex rel. Robinson v. Chancellor, 120 N.C. App. 636, 463 S.E.2d 293 (1995); Democratic Party v. Guilford County Bd. of Elections, 342 N.C. 856, 467 S.E.2d 681 (1996); Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996); Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59 (1996); Beck v. Beck, 125 N.C. App. 402, 481 S.E.2d 317 (1997); T & T Dev. Co. v. Southern Nat'l Bank, 125 N.C. App. 600, 481 S.E.2d 347 (1997).

II. VOLUNTARY DISMISSAL.

How Filing Requirements of Subdivision (a)(1)(i) May Be Met. — No means other than oral notice in open court have been allowed to substitute for the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

A plaintiff is free to abandon an alleged or potential claim against another party at any time. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under subdivision (a)(1) of this rule, plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under the plain language of subdivision (a)(1), a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

The two-dismissal rule applies only when the plaintiff has twice dismissed an action based on or including the same claim, and, as plaintiffs dismissed their first action only once, the two-dismissal rule did not apply; plaintiffs' voluntary dismissal of their own claim against one defendant did not constitute an adjudication on the merits pursuant to subdivision (a)(1) and plaintiffs were not barred from bringing action for crop damage. Hopkins v. Ciba-Geigy Corp., 111 N.C. App. 179, 432 S.E.2d 142 (1993).

A voluntary dismissal is effective whether or not a court has jurisdiction. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

No Court Action Required. —

A notice of dismissal pursuant to subdivision (a)(1) of this section is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Amendment Pursuant to § 1A-1, Rule 60(b). — A voluntary dismissal under subsection (a)(1) of this rule can be amended pursuant to § 1A-1, Rule 60(b). Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Dismissal After Entry of Final Order Ineffective. —

Under subsection (a) and existing case law, parties may not voluntarily dismiss a final custody and child support order. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

Order May Not Be Vacated by Stipulation. — Where an order of the trial court awarding plaintiff permanent custody and obligating defendant to pay permanent child support was rendered, nothing in this rule granted authority to the parties to vacate by stipulation the order previously entered in the action. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

When Plaintiff May Voluntarily Dismiss Where Defendant Has Asserted Counterclaim. —

Where plaintiff took a voluntary dismissal of its remaining 26 claims after plaintiff had been granted summary judgment on defendants' counterclaims and after their initial appeal had been dismissed as interlocutory, since plaintiff's claims were still pending at the time the trial court entered judgment on defendants' counterclaims and their appeal was dismissed as interlocutory, defendants' counterclaims were completely adjudicated at the time plaintiff took its voluntary dismissal; plaintiff was entitled to take a voluntary dismissal of their claims and refile them within one year of the voluntary dismissal without defendant's consent. Berkeley Fed. Sav. Bank v. Terra Del Sol, Inc., 119 N.C. App. 249, 457 S.E.2d 736 (1995), discretionary review improvidently allowed, 342 N.C. 639, 466 S.E.2d 276 (1996).

This rule provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Where plaintiff's first voluntarily dismissed suit, etc. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Second Voluntary Dismissal Barred Derivative Action. — Plaintiff's second voluntary dismissal against manager of restaurant operated to bar her derivative claims against restaurant itself. Graham v. Hardee's Food Sys., 121 N.C. App. 382, 465 S.E.2d 558 (1996).

"Second dismissal" rule does not make voluntary dismissals by stipulation or order of court, etc. —

The "second dismissal" rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," even when they follow a previously filed notice of voluntary dismissal. North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991).

The one-year limitation period within which plaintiff might have renewed her claim under subdivision (a)(1) commenced on the date plaintiff's counsel stated in open court that he intended to file notice of voluntary dismissal and not five days later when voluntary dismissal was filed. Baker v. Becan, 123 N.C. App. 551, 473 S.E.2d 413 (1996).

Second Complaint Not Barred by Statute of Limitations. — Where there was no evidence of record that plaintiff's sole intent in filing the first complaint was to dismiss it in order to gain another year in which to file a "sufficient" complaint, plaintiff waited over two months to dismiss his original complaint and there was no judicial admission that plaintiff filed and dismissed his first complaint in bad faith, the "savings" provision of subdivision (a)(1) properly applied to plaintiff's complaint so that his second complaint was not barred by the statute of limitations. Hawkins v. State, 117 N.C. App. 615, 453 S.E.2d 233, cert. dismissed as improvidently granted, 342 N.C. 188, 463 S.E.2d 79 (1995).

Voluntary Dismissal as Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of § 1A-1, Rule 60(b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

When One-Year Period Begins to Run. —

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to subsection (a)(1) of this rule to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed. Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

Adequacy of Oral Notice of Dismissal. —

Oral notice of a voluntary dismissal is effective and satisfies the requirements of this Rule. Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 481 S.E.2d 334 (1997).

Lien May Not Be Cancelled. — In light of the requirement of § 44A-16(4) that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

A party may refile an action to perfect a lien after taking a voluntary dismissal without prejudice pursuant to subsection (a)(1) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Equitable Distribution Claim. — Where defendant sets up a claim for affirmative relief against a plaintiff arising out of the same transactions alleged by the plaintiff, plaintiff cannot take a voluntary dismissal without the consent of the defendant; however, plaintiff's original claim may be barred by law if the court finds that separation agreements fully disposed of the parties' rights arising out of the marriage, and thus bar an equitable distribution claim. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed; even if the court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Attorneys' Fees. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to this rule, the trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under § 1A-1, Rule 11 or § 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Collateral Issues. — Attorneys' fee requests under § 1A-1, Rule 11 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Attorneys' fee requests under § 1A-1, Rule 11 and § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to "purge his violation of § 1A-1, Rule 11 or § 6-211.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers." Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

A voluntary dismissal pursuant to subsection (a) does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of this rule and § 1A-1, Rule 52(a). Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Court Costs. — Where plaintiff takes a voluntary dismissal pursuant to this rule, no suit is pending thereafter on which the court could make a final order. However, the trial court retains authority to apportion and tax court costs. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Following Dismissal. — Absent a rule to the contrary, sanctions motions may appropriately be filed after a voluntary dismissal. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997).

Savings Provision. — The one-year savings provision of subdivision (a)(1) of this rule applies when plaintiffs and defendants stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court. Bockweg v. Anderson, 328 N.C. 436, 402 S.E.2d 627 (1991).

Dismissal Not Allowed. — Where plaintiff attempted to dismiss her counterclaim, in action which sought enforcement of the parties' separation agreement after defendant had replied and sought affirmative relief arising out of the same transaction, plaintiff's counterclaim could not be dismissed because plaintiff had not moved to strike parts of defendants reply in 10 years. Lafferty v. Lafferty, 125 N.C. App. 611, 481 S.E.2d 401 (1997).

III. INVOLUNTARY DISMISSAL.

A. In General.

The Savings Provision. — The section (b) language by which the judge may, in his discretion, grant plaintiff an additional one year or less to refile is often referred to as the "savings provision" of Rule 41(b). 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Generally, if a plaintiff wishes to take advantage of the savings provision under section (b) it is plaintiff's responsibility to convince the court to include in the order or opinion a statement specifying that plaintiff had additional time to refile. 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Involuntary Dismissal May Be Used to Sanction, etc. —

Under subsection (b) of this rule, a trial court may enter sanctions for failure to prosecute only where the plaintiff or his attorney "manifests and intention to thwart the progress of the action to its conclusion" or "fails to progress the action towards its conclusion" by engaging in some delaying tactic. Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

Function of Judge. —

In accord with first paragraph in the main volume. See C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

In accord with second paragraph in the main volume. See C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

There is no exception under section (b), etc. —

The savings provision of subsection (b) did not apply to allow plaintiff an additional year to file in state court when the federal court order dismissing his action did not specify additional time within which to file. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

Motion to Dismiss Improper. — In a jury trial the defendant's motion to dismiss was improper, as was the court's granting of the motion. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Petition for Certiorari. — Commencing an action in federal court did not toll negligence statute of limitation and did not keep it tolled until the United States Supreme Court ruled on a petition for certiorari to review an involuntary dismissal of that federal action. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

Statute of Limitations Applicable. — Order which stated dismissal was without prejudice and contained no specification whatsoever with regard to the time in which plaintiff could commence a new action based on the same claim was subject to the statutory statute of limitations. 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Only in an action tried without a jury may the defendant move for an involuntary dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

B. Failure to Prosecute or to Comply with Rules or Orders.

Dismissal for Failure to Prosecute Held Error. — Where nothing in the record indicated that the plaintiffs failed to assist or cooperate with their attorneys or that they were not diligent in prosecuting their action, the entry of sanctions against either the plaintiffs or their attorney could not be upheld on the ground of the plaintiffs' failure to prosecute. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

The trial court did not abuse its discretion, etc. —

Where trial court found that corporate officer's failure to account made it impossible for receivers to defend against claims of that officer and his wife against the corporation in liquidation, trial court was authorized, pursuant to section (b) of this rule, to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the court's order. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

C. Failure to Show Right to Relief.

Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence. —

A defendant in an action being tried

without a jury may test the sufficiency of the plaintiff's evidence by moving at the close of plaintiff's evidence for involuntary dismissal under subsection (b) of this rule on the ground that upon the facts and the law the plaintiff has shown no right to relief. United Carolina Bank v. First Union Nat'l Bank, 109 N.C. App. 201, 426 S.E.2d 462 (1993).

Deference to Be Accorded to Court's Judgment. — In the context of an involuntary dismissal, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. The trial court's judgment must be granted the same deference as a jury verdict. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

When Involuntary Dismissal Should Be Granted. —

In accord with the main volume. See Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Dismissal Properly Denied. — In an action for breach of express and implied warranties and damages arising out of plaintiff's purchase of an automobile from defendant, it was undisputed that defendant informed plaintiffs of a warranty and that the car suffered from several defects. Plaintiffs attempted to have the car repaired within the warranty period, but to no avail. Based on these facts and other evidence, it would have been improper for the trial court to find that plaintiffs had shown "no right to relief" for their breach of warranty claims; therefore, the trial court properly denied defendant's motion to dismiss. Riley v. Ken Wilson Ford, Inc., 109 N.C. App. 163, 426 S.E.2d 717 (1993).

Remedy Held Unavailable. — In a case not tried by a jury, though the judge's determination that plaintiff was contributorily negligent as a matter of law was error, it was not reversible error. The transcript indicated that the judge made a factual finding from the evidence that plaintiff was contributorily negligent, a finding clearly supported by competent evidence. If the case had been tried to a jury and dismissed before the jury considered it, a new trial would have had to be ordered, but ordering a new trial before a fact-finder who has permissibly found that plaintiff was contributorily negligent and could not prevail in her action would avail her nothing. Church v. Greene, 100 N.C. App. 675, 397 S.E.2d 649 (1990).

IV. COSTS.

Costs from Earlier Action. — A trial court, in one action, can tax costs incurred in an earlier action that was voluntarily dismissed. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Deposition Expenses. —

"Costs" also includes "deposition expenses," unless the depositions were unnecessary, even though an award of deposition expenses is not expressly allowed by statute. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Rule 42. Consolidation; separate trials.

CASE NOTES

I. In General.
II. Consolidation.
III. Separate Trials.

I. IN GENERAL.

Applied in Braddy v. Nationwide Mut. Liab. Ins. Co., 122 N.C. App. 402, 470 S.E.2d 820 (1996).

Cited in Crump v. Board of Educ., 107 N.C. App. 375, 420 S.E.2d 462 (1992); Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993); Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995); Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

II. CONSOLIDATION.

And Will Not Be Disturbed Absent Abuse of Discretion and Showing of Prejudice. —

The trial court did not abuse its discretion by denying defendant's motion to consolidate cases. Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997).

III. SEPARATE TRIALS.

Within Discretion of Trial Judge. — The plain language of subsection (b) vests in the trial court broad discretionary authority to determine when bifurcation is appropriate. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

Separation Held Proper. — Claim against one of several defendants arose from circumstances totally different from those that gave rise to the other claims involved and trying that issue separately was a comparatively simple process that had the advantage of possibly making it unnecessary to try the other issues; therefore, severance of that claim was proper. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

No Error Where Sound Grounds for Separation Exist. — Since subsection (b) of this rule authorizes the trial judge to order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice," the severance of the claim against one of several defendants was within the court's discretion, and was not error since sound grounds therefor existed. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Rule 43. Evidence.

CASE NOTES

I. In General.
III. Examination of Hostile Witnesses and Adverse Parties.

I. IN GENERAL.

Stated in Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

III. EXAMINATION OF HOSTILE WITNESSES AND ADVERSE PARTIES.

Termination of Parental Rights. — A respondent in a proceeding to terminate her parental rights is a party to the proceeding, and may be called to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required. In re Davis, 116 N.C. App. 409, 448 S.E.2d 303, cert. denied, 338 N.C. 516, 452 S.E.2d 808 (1994).

Rule 44. Proof of official record.

CASE NOTES

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the plaintiff was not required to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of validity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or by other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Chapter 8 of the General Statutes and State law. The court's determination shall be treated as a ruling on a question of law. (1995, c. 389, s. 5.)

Editor's Note. — Session Laws 1995, c. 389, s. 6, provides that this rule is effective October 1, 1995, and applicable to civil actions filed on or after that date.

Rule 45. Subpoena.

Legal Periodicals. —
For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

Applied in Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996).

Cited in Hall v. Cumberland County Hosp. Sys., 121 N.C. App. 425, 466 S.E.2d 317 (1996).

Rule 46. Objections and exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Preserving Matters Underlying a Motion in Limine. — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd in part and aff'd in part, 333 N.C. 455, 427 S.E.2d 317 (1993).

Failure to Object to Discussion Between Court and Jurors. — Plaintiff who did not object or otherwise voice a concern during a discussion between the court and jurors regarding court's procedure for correcting jury's failure to deliberate on the issues, failed to preserve an exception to that procedure. Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990).

Applied in Badgett v. Davis, 104 N.C. App. 760, 411 S.E.2d 200 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

Rule 49. Verdicts.

CASE NOTES

I. In General.

I. IN GENERAL.

Form and number of issues, etc. — The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Applied in Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Cited in Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

- I. In General.
- II. Directed Verdict.
  - A. In General.
  - B. Statement of Specific Grounds.
- III. Judgment Notwithstanding the Verdict and New Trial.

I. IN GENERAL.

When Motions Granted. — A defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, establishes its defense as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to this rule or § 1A-1, Rule 56 may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in Hazelwood v. Landmark Bldrs., Inc., 100 N.C. App. 386, 396 S.E.2d 342 (1990); Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990); Abernethy v. Spartan Food Sys., 103 N.C. App. 154, 404 S.E.2d 710 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Wilson v. Pearce, 105 N.C. App. 107, 412 S.E.2d 148 (1992); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992); Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992); Phillips ex rel. Schultz v. Holland, 107 N.C. App. 688, 421 S.E.2d 608 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994); Greene v. Carpenter, Wilson, Cannon & Blair, 119 N.C. App. 415, 458 S.E.2d 507 (1995); Payne v. Parks Chevrolet, Inc., 119 N.C. App. 383, 458 S.E.2d 716 (1995); Smith v. Carolina Coach Co., 120 N.C. App. 106, 461 S.E.2d 362 (1995).

Quoted in Schwartzbach v. Apple Baking Co., 109 N.C. App. 216, 426 S.E.2d 438 (1993); Ace Chem. Corp. v. DSI Transps., Inc., 115 N.C. App. 237, 446 S.E.2d 100 (1994).

Stated in Peal ex rel. Peal v. Smith, 115 N.C. App. 225, 444 S.E.2d 673 (1994).

Cited in Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991); Olvera v. Charles Z. Flack Agency, Inc., 106 N.C. App. 193, 415 S.E.2d 760 (1992); Ace, Inc. v. Maynard, 108 N.C. App. 241, 423 S.E.2d 504 (1992); B.B. Walker Co. v. Burns Int'l Sec. Serv., Inc., 108 N.C. App. 562, 424 S.E.2d 172 (1993); McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994); Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994); Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13 (1994); Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995); Stanfield v. Tilghman, 342 N.C. 389, 464 S.E.2d 294 (1995); Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996).

II. DIRECTED VERDICT.

A. In General.

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990), aff'd, 328 N.C. 566, 402 S.E.2d 409 (1991).

Degree of Probability Must Exist with Issue of Causation. — Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve, not just mere possibility. Hinson v. National Starch & Chem. Corp., 99 N.C. App. 198, 392 S.E.2d 657 (1990).

As Considered in the Light Most Favorable to Nonmovant. —

On a defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. Atlantic Tobacco Co. v. Honeycutt, 101 N.C. App. 160, 398 S.E.2d 641 (1990), discretionary review denied, 328 N.C. 569, 403 S.E.2d 506 (1991).

If There Is More Than a Scintilla of Evidence, Motion Should Be Denied. —

More than a scintilla of evidence existed from which the jury could find that defendant's trespass was accompanied by a reckless disregard for plaintiffs' rights and an element of intent after defendant discovered he had trespassed on plaintiffs' property and continued to trespass; therefore, the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Objections Not Equivalent to Directed Verdict. — Plaintiff's objections to the issue of contributory negligence made at the conference on the jury instructions were not the equivalent of a motion for directed verdict made pursuant to subdivision (a) of this rule, as plaintiff could have made a proper motion at the close of evidence and plaintiff's objection during the jury instruction conference would not allow defendant a proper chance to correct any errors in its proof of contributory negligence. Thus, the trial court erred in holding that plaintiff's objection to the contributory negligence issue was the equivalent of a directed verdict. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 649, aff'd, per curiam, 342 N.C. 406, 464 S.E.2d 298 (1995).

Contributory Negligence Should Have Been a Jury Question. — Where evidence did not establish plaintiff's contributory negligence as a matter of law, that issue should have been resolved by the jury, and the directed verdict in favor of defendant was reversed. Crane v. Caldwell, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

Appellate Review of Motion. — Because defendant failed to assert the insufficiency of the evidence to support plaintiffs' action for trespass or an award of actual damages as grounds for his motion for a directed verdict, defendant waived his right to appellate review of these issues. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Affirmative Defenses. — Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such instance is appropriate. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

It is rarely appropriate to grant a directed verdict for a party bearing the burden of proof. Looney v. Community Bible Holiness Church, 103 N.C. App. 469, 405 S.E.2d 811 (1991).

Directed Verdict Not Necessarily Prevented by Prima Facie Case. — Nonmoving party's establishment of a prima facie case did not necessarily prevent the granting of a directed verdict in the moving party's favor. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Directed Verdict Granted Despite Establishment of Prima Facie Case. — Where insurer showed that the insured made representations which were material and false and, by so doing, fully overcame plaintiff's prima facie case, insurer was entitled to a directed verdict as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Determination of Validity of Will. — Where appropriate, a trial court may direct a verdict for propounders of a will in a caveat proceeding at the close of all evidence. In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992), aff'd in part, rev'd in part, 334 N.C. 140, 430 S.E.2d 922 (1993).

Directed Verdict When, etc. — A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

When a defendant pleads as a defense the plaintiff's contributory negligence, the defendant has the burden of proof on the issue, and if the defendant offers no evidence, a directed verdict for the defendant based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, and the non-movant's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn therefrom. Price v. Jack Eckerd Corp., 100 N.C. App. 732, 398 S.E.2d 49 (1990).

Directed verdict on issue of contributory negligence was improper where the plaintiff testified that he was not completely blinded by the oncoming headlights as he approached the tractor-trailer, the plaintiff could see much more than the edge of the road, and the plaintiff may have been keeping a proper lookout without realizing that he was partially blinded only as to the area beyond the tractor-trailer's headlights. In such a deceptive visual situation, the plaintiff may not have been knowingly driving into a blinded area, for it would have appeared as though he could see into the distant darkness. From the evidence there was insufficient evidence to establish that plaintiff was contributorily negligent as a matter of law. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

Failure to Show One Cause of Damages More Likely than Others. — Directed verdict was proper where plaintiff did not offer any testimony suggesting that one cause of his damages was more likely than the others. Such testimony as to causation, being speculative in nature, would have resulted in a verdict founded upon a series of mere possibilities; and reliance upon a choice of possibilities amounts to nothing more than guesswork. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

Denial of Directed Verdict. — If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. Snead v. Holloman, 101 N.C. App. 462, 400 S.E.2d 91 (1991).

A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish; a motion for judgment notwithstanding the verdict is essentially a renewal of a motion for directed verdict and the rules regarding the sufficiency of the evidence to go to the jury are equally applicable. Kremer v. Food Lion, Inc., 102 N.C. App. 291, 401 S.E.2d 837 (1991).

Or His Evidence Is Sufficient to Survive Motion. — Testimony by clinical psychologist which indicated that conduct violated the standard of care as it related to clinical assistants in substance abuse hospitals in similar communities and which indicated that victim suffered severe emotional distress as a result was sufficient to withstand a directed verdict. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, — N.C. —, 467 S.E.2d 713 (1996).

Motion for Directed Verdict Properly Granted. — Defendant presented ample evidence of plaintiffs' breach of fiduciary duty; accordingly, the trial court did not err in denying plaintiffs' motion for a directed verdict at the close of defendant's evidence. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Scope of Review on Appeal. — Where a party moves for a directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury. Upon appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

B. Statement of Specific Grounds.

Subsection (a) requires that a motion for directed verdict state specific grounds for the motion; failure to state such grounds is not a basis for an automatic reversal of the directed verdict on appeal. In re Will of Jones, 114 N.C. App. 782, 443 S.E.2d 363, cert. denied, 337 N.C. 693, 448 S.E.2d 526 (1994).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

What Is Motion for Judgment N.O.V. —

A motion for judgment pursuant to subdivision (b)(1) is essentially a renewal of an earlier motion for a directed verdict. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

Motion for Directed Verdict Prerequisite to Motion for Judgment N.O.V. —

Where basis of plaintiff's motion for JNOV was that evidence clearly established that defendant's negligence was the proximate cause of his injuries, as proximate cause was not specifically raised by the plaintiff to support the directed verdict motion, JNOV on that basis would not be proper. Lassiter v. English, — N.C. App. —, 485 S.E.2d 840 (1997).

Standards for granting a motion for judgment n.o.v. are the same as those for granting a directed verdict.

The test for determining the sufficiency of the evidence when ruling on a motion for judgment is identical to that applied when ruling on a motion for directed verdict. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

Grant of Judgment N.O.V. Erroneous, etc. —

In accord with first paragraph in the main volume. See Kron Medical Corp. v. Collier Cobb & Assocs., 107 N.C. App. 331, 420 S.E.2d 192, cert. denied, 333 N.C. 168, 424 S.E.2d 910 (1992).

Failure to Present Underlying Judgment. — Where, in notice of appeal, defendant designated only the order denying the motion for judgment n.o.v., but did not give notice of appeal from the judgment itself, the notice of appeal failed to properly present the underlying judgment for the court's review. Boger v. Gatton, 123 N.C. App. 635, 473 S.E.2d 672 (1996).

Rule 51. Instructions to jury.

CASE NOTES

I. In General.
II. Charge to the Jury.
  A. Generally.
  B. Decisions Under Prior Law.
IV. Special Instructions.
V. Opinion of the Judge.

I. IN GENERAL.

Appellate Review of Improper Remark. — Where plaintiff alleges that he has been deprived of right to a fair trial by improper remarks in the hearing of the jury, court will first determine whether the trial judge's remarks, in light of the circumstances under which they were made, were improper and then determine whether such remarks were prejudicial. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Remark Regarding Need to Shorten Trial. — Trial judge did not commit prejudicial error in remarking to jury about need to shorten length of trial, which was not a statement of opinion. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Applied in Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993).

Stated in Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991).

Cited in Bowden v. Bell, 116 N.C. App. 64, 446 S.E.2d 816 (1994); Cooke v. Grigg, 124 N.C. App. 770, 478 S.E.2d 663 (1996).

II. CHARGE TO THE JURY.

A. Generally.

Editor's Note. — *The cases under analysis line II, Charge to the Jury, have been reedited and printed in the supplement to distinguish between those cases* *decided under section (a) of this rule as it read before and after the amendment in 1985.*

The purpose of instructing the jury is to clarify the issues, summarize the relevant evidence, and state the law applicable thereto. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

It is the duty of the trial judge, without any special requests, to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 358 S.E.2d 566 (1987).

Instruction as to Every Substantial Feature Required. — Though the trial court is no longer required to explain the application of the law to the evidence, it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987).

Duty of Judge Who Undertakes to Apply Law to Evidence. — Although the trial judge is no longer required to apply the law to the evidence, if the judge undertakes to do so he must instruct completely and without omission. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Form and Number of Issues Submitted Are Within Discretion of Judge. — While the judge must submit to the jury such issues raised by the pleadings and evidence as are necessary to fairly adjudicate the controversy at bar, the form and number of the issues submitted is within the sound discretion of the trial judge. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Failure of the trial court to declare and explain the law with respect to a substantial feature of the case was prejudicial error, entitling defendants to a new trial. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987), appeal dismissed, 322 N.C. 607, 370 S.E.2d 416 (1988).

Peremptory Instruction Properly Denied. — Defendant's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the car's tendency to overturn, and evidence that he drove at or below the speed limit, all permitted more than the single inference that defendant was negligent; therefore, trial judge properly refused to give peremptory instruction on negligence. Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989).

In a personal injury action where plaintiff failed to allege permanent injuries in her pleadings and did not amend her complaint to include permanent injuries, the trial court did not err by allowing testimony that plaintiff's injuries were permanent, nor by instructing the jury on the issue of permanency; defendant's objections were all general and failed to avail themselves of the opportunity to demonstrate prejudice or to obtain a continuance as provided by this rule. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Court improperly instructed the jury on the aggravation of plaintiff's pre-existing condition where the evidence showed no aggravation of a pre-existing condition. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Denial of Requested Instruction Upheld. — Trial court's denial of plaintiffs' request that the jury be instructed that collision furnished some evidence of negligence was not an abuse of discretion, since plaintiffs' requested instruction amounted to an application of the law to the evidence, which is not required. Smith v. Bohlen, 95 N.C. App. 347, 382 S.E.2d 812 (1989), aff'd sub nom. State v. Brewer, 328 N.C. 515, 402 S.E.2d 380 (1991).

B. Decisions Under Prior Law.

Editor's Note. — *The cases cited below were decided prior to the 1985 amendment rewriting section (a) of this rule, which formerly provided that the judge should declare and explain the law arising on the evidence, but give no opinion on whether a fact had been proved.*

Requirement of Former § 1-180 Continued by This Rule. — The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case" is a continuation of the requirement contained in former § 1-180. Terry v. Jim

Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

Civil cases are governed by section (a) of this rule, which incorporates the substance of former § 1-180. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The provisions of section (a) are identical to those of former § 1-180, which formerly governed the trial of civil cases as well as criminal cases. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Former § 1-180 is now embodied in substance within section (a) of this rule. Heath v. Swift Wings, Inc., 40 N.C. App. 158, 252 S.E.2d 526, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

Although the provisions of § 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. Consolidated Sys. v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

This rule confers a substantial legal right, and imposes upon the trial judge a positive duty, so that his failure to charge on the substantial features of the case arising on the evidence is prejudicial error, even without a prayer for special instruction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

Not Dependent on Request for Special Instructions. — This rule confers a substantial legal right, not dependent on a request for special instructions, and failure to charge on the material features of a case is prejudicial error. Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

This rule requires the trial judge to perform two positive acts: (1) To declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The chief purpose of a charge is to aid the jury to clearly understand the case and arrive at a correct verdict. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

And to Eliminate Irrelevant Matters. — The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. American Credit Co. v. Brown, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

Judge Must Declare and Explain the Law Arising on the Evidence. — It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

In charging the jury in any civil action, the judge shall declare and explain the law arising on the evidence given in the case. Watson v. White, 60 N.C. App. 106, 298 S.E.2d 174 (1982), rev'd on other grounds, 309 N.C. 498, 308 S.E.2d 268 (1983).

The provisions of this rule require that the trial judge in his charge to the jury shall declare and explain the law arising on the evidence in the case, and unless this mandatory provision of the statute is observed, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974); Martin v. Amusements of Am., Inc., 38 N.C. App. 130, 247 S.E.2d 639, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

In every case the court has the duty to instruct the jury correctly on all substantive features of the case. Duke v. Mutual Life Ins. Co., 22 N.C. App. 392, 206 S.E.2d 796, rev'd on other grounds, 286 N.C. 244, 210 S.E.2d 187 (1974).

The law must be declared, explained and applied to the evidence bearing on the substantial and essential features of a case. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978).

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

The trial court has a duty to explain the law and apply it to the evidence on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

The trial court has wide discretion in presenting the issues to the jury, and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

A mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Jones v. Bess, 26 N.C. App. 1, 214 S.E.2d 599 (1975).

This rule imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case; a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to satisfy the requirements of this rule. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Charge given by trial court that merely recapitulated the evidence, stated the parties' contentions and recited certain general principles of contract law would not suffice. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

As Is a Charge Which Fails to Apply the Law to the Evidence. — A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

Judge's duty is not to charge the jury by implication, but to declare and explain the law arising on the evidence given in the case. Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

What Issues to Be Submitted to Jury. — The judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the

pleadings. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

In order for the trial court to discharge its duty under this rule, the court must give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative. Deep Run Milling Co. v. Williams, 60 N.C. App. 160, 298 S.E.2d 205 (1982).

The trial judge must explain and apply the law to the specific facts pertinent to the issue involved. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

And Relate the Law to the Variant Factual Situations Presented. — When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to the variant factual situations presented by some reasonable view of the evidence. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

The trial judge is not required to review all of the evidence. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

But he must summarize it sufficiently to permit him to explain the application of the law thereto. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

The judge is not required to declare and explain the law on a set of hypothetical facts. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Trial court is not required to read technical statutory language to the jury. Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

Fact that some language of the complaint was used in declaring the law of the case is not error so long as the judge explains all the law arising from the evidence. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

It is error for the trial court to charge the jury upon an abstract principle of law which is not presented by the allegations and evidence. Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Instructions on elements of damages are not proper if the evidence does not reveal a basis for such an award. Spears v. Service Distrib. Co., 27 N.C. App. 646, 219 S.E.2d 817 (1975).

Failure to explain the law and apply it to the evidence on all substantial features of the case constitutes prejudicial error for which the aggrieved party is entitled to a new trial. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Clifford v. River Bend Plantation, Inc., 55 N.C. App. 514, 286 S.E.2d 352 (1982).

Where the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence in the case and how that law should be applied to the evidence, defendant was entitled to a new trial. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Although defendant's trial counsel made no objection to the form of the issues which were submitted to the jury, defendant was entitled to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence, and for errors in the charge there must be a new trial. Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

As Does Failure to Explain the Law as Applied to Evidence Susceptible of Several Interpretations. — When the evidence is susceptible of several interpretations, a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Williamson v. Vann, 42 N.C. App. 569, 257 S.E.2d 102 (1979).

The jury charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception that the instruction might have been better stated will not be sustained. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); Hanks v. Nationwide Mut. Fire Ins. Co., 47 N.C. App. 393, 267 S.E.2d 409 (1980).

In reviewing the charge of a trial court, the Court of Appeals must read and consider the charge as a whole. When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

But erroneous instructions on the burden of proof are not cured by contextual construction. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

Conflicting instructions on a material aspect of the case must be held prejudicial error, since it cannot be determined that the jury was not influenced by the incorrect portion of the charge. Cross v. Beckwith, 16 N.C. App. 361, 192 S.E.2d 64 (1972), rev'd on other grounds, 293 N.C. 224, 238 S.E.2d 130 (1977).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted because it will not be assumed that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

An instruction relating to a factual situation not properly supported by the evidence is erroneous. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Where the instructions of the court are based upon an assumption of facts which are not in evidence, they must be held for error. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

No Error in Failure to Instruct as to Contention Not Supported by Evidence. — There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. The instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. In re Will of Cooley, 66 N.C. App. 411, 311 S.E.2d 613 (1984).

Submission of Defense. — When a party contends that certain acts constitute a defense, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. Plymouth Pallet Co. v. Wood, 51 N.C. App. 702, 277 S.E.2d 462, cert. denied, 303 N.C. 545, 281 S.E.2d 393 (1981).

Specific Acts or Omissions Which Could Constitute Negligence or Contributory Negligence Must Be Stated. — Under this section the trial court must relate to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Zach v. Surry-Yadkin Elec. Membership Corp., 57 N.C. App. 326, 291 S.E.2d 290 (1982).

In a personal injury action arising out of a collision, it is error for the court to fail to instruct the jury as to what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

Where the judge failed to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence and the instructions gave the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them, there was error. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence and the contentions of the parties, and instructed as to the measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, there was reversible error. Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Where the instructions to the jury on the issue of defendant's negligence consisted merely of a brief summary of the evidence, a statement of the issue, a statement on the burden of proof, and general definitions of negligence and proximate cause, and where the trial court failed to relate the principles of law set forth in its instructions to the evidence in this personal injury action, failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties, and failed to relate the contentions of negligence supported by the evidence, such failure was inherently prejudicial under section (a) of this rule. Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Where the court reviewed in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the measurement of damages for personal injury was not error. Love v. Hunt, 17 N.C. App. 673, 195 S.E.2d 135 (1973).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Where the question of whether time was of the essence was a substantial feature of a case, the trial judge was required, without a request, to declare and explain the law with respect thereto. Gelder & Assocs. v. Continental Ins. Co., 15 N.C. App. 686, 190 S.E.2d 674 (1972).

Paraphrase of Law in Condemnation Action Held Insufficient. — Where, in a highway condemnation action, plaintiff's witness, an expert real estate appraiser, testified that the value of defendant's land was increased by the taking because a roadway fronting the property was paved, a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions was not adequate to satisfy the mandate of section (a) of this rule. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

Trial judge properly refused to submit instruction on "proper control" of automobile. See Dunn v. Herring, 75 N.C. App. 308, 330 S.E.2d 834, cert. denied, 314 N.C. 538, 335 S.E.2d 16 (1985).

Instruction for Following Too Closely. — Where violation of § 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

Instruction on Permanent Injury. — Where doctor testified that in his expert opinion plaintiff had an impairment rating to her neck of four percent (4%) as a result of her injury, an impairment rating to her "low" back of five percent (5%), and to her head (for headaches) of three percent (3%), resulting in a 12 percent (12%) impairment of her physical being, this evidence was sufficient to support an instruction on permanent injury. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Peremptory Instructions Not Abolished. — The new Rules of Civil Procedure have not abolished peremptory instructions in proper cases. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Peremptory instruction does not deprive the jury of right to reject evidence because of lack of credibility. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

When Peremptory Instruction May Be Given. — When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction to the effect that if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The correct form of a peremptory instruction is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Duty of Counsel to Point Out Misstatement of the Evidence. — When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

When Inadvertent Misstatement of Evidence Is Reversible Error. — An inadvertence by the court in recapitulating the evidence will not be grounds for reversible error unless it is called to the attention of the court in time for correction. Sims v. Virginia Homes Mfg. Corp., 32 N.C. App. 193, 231 S.E.2d 287 (1977).

A broadside assignment of error to the charge as a whole is ineffective to bring up any portion of the charge for review. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Reversal Where Instruction Is Patently Erroneous. — Although where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973).

IV. SPECIAL INSTRUCTIONS.

Failure to Give Proper Specific Instruction, etc. —

In accord with the main volume. See Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

V. OPINION OF THE JUDGE.

Court's Daily Prayer. — Absent a showing of prejudice by appellants, it could not be concluded that the trial court's daily prayer amounted to an impermissible expression of opinion in violation of subsection (a) of this Rule. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Informal Remarks Held Not Reversible Error. — Judge's remarks to jury on the opening of court for the second and third days of trial, to the effect that jurors should "sit back, relax and stay tuned for the next portion of the trial," may have been informal and even jocular but did not constitute reversible error. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Remarks Not Reversible Error. — While remarks made after the verdict was returned by the court were perhaps not appropriate under a strict reading of this rule, they did not constitute reversible error. Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994).

Rule 52. Findings by the court.

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.
III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.

I. IN GENERAL.

This rule necessarily contemplates that facts be found before conclusions can be reached. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Where an order's rationale is tainted by a process that violates this rule, a new trial of the issues is required. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Issues Must Be Resolved by Trial Court Before Appellate Review. — In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. When all issues are not so resolved by the trial court, an appellate court has no option other than to vacate the order and remand the cause to the trial court for completion. Small v. Small, 107 N.C. App. 474, 420 S.E.2d 678 (1992).

Requirement of Appropriately Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Under this rule, the facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. Guilford County Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659, cert. denied, 329 N.C. 496, 407 S.E.2d 533 (1991).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of § 1A-1, Rule 41(b) and subsection (a) of this rule. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); Mashburn v. First Investors Corp., 111 N.C. App. 398, 432 S.E.2d 869 (1993); Brower v. Killens, 122 N.C. App. 685, 472 S.E.2d 33 (1996).

Quoted in Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Provident Finance Co. v. Rowe, 101 N.C. App. 367, 399 S.E.2d 368 (1991); Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Stated in Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993).

Cited in Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992); Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479 (1992); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App.

83, 425 S.E.2d 739 (1993); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Timeliness of Request. — A request for findings and conclusions under subsection (a)(2) of this rule is untimely if made after the entry of a trial court's order. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Under § 1A-1, Rule 60(b), the trial court is not required to make findings of fact unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Compliance Held Insufficient. — Where deputy commissioner's order that was modified and adopted by the full Industrial Commission was devoid of any findings of fact on the claims of liability and negligence, the opinion was vacated. Parker v. State DOT, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

Bare Conclusions Insufficient. — Although this rule requires that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law, a bare conclusion such as the one in this case does not meet the requirements of subdivision (a)(1). Chapel Hill-Carrboro City Sch. Sys. v. Chavioux, 116 N.C. App. 131, 446 S.E.2d 612 (1994).

The findings recited by the Disciplinary Committee in its order were inadequate to support its conclusion that the defendant's letter was threatening, because the Committee made no findings as to the exact nature of that threat nor as to the specific relationship between the defendant's "threatening letter" and the administration of justice. Thus the Committee's findings failed to conform to subdivision (a)(1) of this rule. North Carolina State Bar v. Beaman, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Deletion of Finding Without Reconsidering Conclusion Prejudicial to Defendant. — Where a judge initially found that defendant had committed adultery and then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony, that process violated the sequence required by this rule to the prejudice of the defendant. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Findings and Conclusions Generally Not Required on Motions Absent Request. — Where no request was made that the trial judge make findings to support the denial of its motion, it was presumed that the judge made the determination based upon proper evidence. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Discretion of Court. — A court is not required to make findings of fact and conclusions of law when ruling on preliminary motions, but it has the discretion to do so; however, if a court does enter conclusions of law, they must be supported by adequate findings. Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994).

Consent Judgment. — A consent judgment is merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment need not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties. In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

Rule 53. Referees.

Legal Periodicals. —

For note, "Rent-A-Judges and the Cost of Selling Justice," see 44 Duke L.J. 166.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993); Sharp v. Gulley, 120 N.C. App. 878, 463 S.E.2d 577 (1995).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

Legal Periodicals. —
For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

Purpose. — The purpose of subsection (c) is to provide plaintiff with whatever relief is supported by the complaint's factual allegations and proof at trial. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

A trial court cannot confer appeal status under subsection (b) by denominating its decision a "final judgment" if its ruling is not indeed such a judgment; the trial court's order denying insurance company's motion for summary judgment did not constitute a "final" judgment and was therefore not appealable. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under subsection (b). Knighten v. Barnhill Contracting Co., 122 N.C. App. 109, 468 S.E.2d 564 (1996).

Finality. — This rule indicates that finality with respect to parties and claims is a key aspect of a judgment as it relates to its entry and appealability. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between this rule and § 1A-1, Rule 58 than from the express language of Rule 58 itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Requirements of Rule. — This rule imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joining the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interlocutory Order Defined. —
Order requiring party to take actions "pending further orders of this court," was an interlocutory order, since it was made during the pendency of the action and did not dispose of the case in a final manner. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

When Summary Judgment Is Immediately Appealable. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

There are two avenues by which a

party may immediately appeal an interlocutory order of judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to this rule an immediate appeal may lie. Second, an appeal is permitted under §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tinch v. Video Indus. Servs., Inc., 124 N.C. App. 391, 477 S.E.2d 193 (1996).

There are two avenues by which an interlocutory judgment or order can be immediately appealed. First, if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal, and second, an interlocutory order can be immediately appealed under §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996).

Alternative Method to Appeal Interlocutory Orders. — An interlocutory order not appealable under subsection (b) may nevertheless be appealed pursuant to § 1-277 and § 7A-27(d) of the Rules of Civil Procedure which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Applied in Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); Miller v. Swann Plantation Dev. Co., 101 N.C. App. 394, 399 S.E.2d 137 (1991); Pitt v. Williams, 101 N.C. App. 402, 399 S.E.2d 366 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); McNeil v. Hicks, 111 N.C. App. 262, 431 S.E.2d 868 (1993); Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167, aff'd on rehearing, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, rehearing dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995); Reynolds v. Reynolds, 114 N.C. App. 393, 442 S.E.2d 133 (1994); Jenco v. Signature Homes, Inc., 122 N.C. App. 95, 468 S.E.2d 533 (1996).

Quoted in Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991); Janus Theatres of Burlington, Inc. v. Aragon, 104 N.C. App. 534, 410 S.E.2d 218 (1991); Donnelly v. Guilford County, 107 N.C. App. 289, 419 S.E.2d 365 (1992).

Stated in Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993); Farm Credit Bank v. Van Dorp, 110 N.C. App. 759, 431 S.E.2d 222 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Moose v. Nissan of Statesville, Inc., 115 N.C. App. 423, 444 S.E.2d 694 (1994); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994).

Cited in Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); Beatty v. Charlotte-Mecklenburg Bd. of Educ., 99 N.C. App. 753, 394 S.E.2d 242 (1990); Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992); Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 335 N.C. 77, 436 S.E.2d 113 (1993); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993); Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 439 S.E.2d 787, cert. denied, 336 N.C. 780, 447 S.E.2d 422 (1994); Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 443 S.E.2d 127 (1994); Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 444 S.E.2d 252 (1994); Bray v. North Carolina Farm Bureau Mut. Ins. Co., 115 N.C. App. 438, 445 S.E.2d 79 (1994); Coastal Ready-Mix Concrete Co. v. North Carolina Coastal Resources Comm'n, 116 N.C. App. 119, 446 S.E.2d 823 (1994); Rouse v. Pitt County Mem. Hosp., 116 N.C. App. 241, 447 S.E.2d 505 (1994); Gillespie v. Gillespie, 116 N.C. App. 660, 448 S.E.2d 857 (1994); North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995); Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995); Kaplan v. Prolife Action League, 123 N.C. App. 720, 475 S.E.2d 247 (1996); Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Determination of Fundamental Claim Immediately Appealable. — By ordering a former employee to assign a patent, the trial court effectively decided ownership of the patented process, and where this determination was fundamental to the disposition of the remaining claims, grant of summary judgment on the ownership claim was immediately appealable as affecting a substantial right. Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993).

Appeal from Judgment Adjudicating Fewer Than All Claims, Rights or Liabilities. —

Entry of summary judgment for fewer than all defendants was not a final judgment and was not immediately appealable as no substantial right was involved and the trial court did not certify the appeal under subdivision (b) of this rule. Long v. Giles, 123 N.C. App. 150, 472 S.E.2d 374 (1996).

Factors for Immediate Appealability of Judgment. — In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as § 1-277 or § 7A-27. North Carolina R.R. v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993), appeal dismissed, review denied, 336 N.C. 608, 447 S.E.2d 397 (1994), cert. denied, — U.S. —, 115 S. Ct. 2554, 132 L. Ed. 2d 808 (1995).

Judgments Held Nonappealable. —

There were no factual issues common to the claims determined by summary judgments or the claims remaining, so that no substantial right was affected and plaintiff was not entitled to interlocutory appeal of summary judgments, since plaintiff did not present identical factual issues creating the possibility of two trials on the same issue. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

The denial of defendant's motion for stay did not dispose of any of the claims or parties, the trial court did not certify the case for immediate appeal under this rule, and defendants did not show that the trial court's decision deprived them of a substantial right which would be lost absent immediate review. Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996).

Order Denying Release of Escrow Funds Held Not Appealable. — The effect of an order denying the release of the funds held in escrow under § 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either this rule or §§ 1-277 and 7A-27(d). State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Denial of Summary Judgment Only Appealable, etc. —

The denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under subsection (b) of this rule. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142, cert. denied, 328 N.C. 731, 404 S.E.2d 868 (1991).

Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) *Judgment.* — Judgment by default may be entered as follows:

(1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the

plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge. — In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

(c) *Service by publication.* — When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) *Setting aside default.* — For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) *Plaintiffs, counterclaimants, cross claimants.* — The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) *Judgment against the State of North Carolina.* — No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1; 1971, cc. 542, 1101; 1977, c. 675; 1991, c. 278, s. 1; 1993 (Reg. Sess., 1994), c. 733, s. 3.)

Editor's Note. —

Session Laws 1991, c. 278, s. 1, which amended subsection (c), was effective June 12, 1991, and was applicable to actions commenced on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 733, s. 3, which amended this section, was effective August 1, 1994, and applicable to civil actions commenced on or after that date.

CASE NOTES

I. In General.
II. Entry of Default.
III. Entry of Judgment by Default.
  B. By Judge.
IV. Setting Aside Default.

I. IN GENERAL.

Pre-answer Motion to Dismiss was not a responsible pleading within the confines of Rule 12 of the North Carolina Rules of Civil Procedure, preventing the entry of default judgment pursuant to this rule. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

Applied in Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993).

Cited in Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992); Brown v. Booker, 121 N.C. App. 366, 465 S.E.2d 75 (1996); Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

II. ENTRY OF DEFAULT.

Interlocutory Entry of Default. — Where the trial court in its findings of fact referred to petitioner's "Motion for Entry of Default" and concluded that "the Clerk shall sign and file the Entry of Default, if not already signed and filed," and where the trial court then set for hearing a determination as to the money and property taken, damages caused, and "all other things" taken, the order entered by the trial court was not a final order or final judgment but was an interlocutory entry of default and not subject to appellate review. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

Defaults may not be entered after an answer has been filed, etc. —

According to the language of this section, defaults may not be entered after answer has been filed, even though the answer is late; however, a better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. Fieldcrest Cannon Employees Credit Union v. Mabes, 116 N.C. App. 351, 447 S.E.2d 510 (1994).

Prior Hearing Not Required. — The North Carolina Industrial Commission was not required by subsection (f) to conduct a full evidentiary hearing prior to entering default against the State. Parker v. State DOT, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

Effect of Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Default Entered Properly. — Denial of the defendants' motion to set aside entry of default was not in error. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

III. ENTRY OF JUDGMENT BY DEFAULT.

B. By Judge.

When Judgment Must Be Entered by Judge. —

Where the claim is not for a sum certain or for a sum which can by computation be made certain, the party entitled to the default judgment must make his application to a judge. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

IV. SETTING ASIDE DEFAULT.

Attack of Default Judgment on Appeal. — Failure to attack default judgment at the trial court level precludes such an attack on appeal. University of N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892, cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

Party May Not Claim Judgment Is Defective After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Superior court order which kept a default judgment in effect and permitted it to be enlarged from $7,039 to $35,857 was erroneous because the court had no authority to enter it. The order neither set aside the default judgment nor relieved plaintiff of it as authorized by this rule or § 1A-1, Rule 60(b), N.C.R.Civ.P. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Motion for Relief on Grounds of Insufficient Service. — In filing a motion to claim exempt property, which was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process, defendant made a general appearance, and her subsequent motion for relief from a default judgment on the grounds of the invalidity of service of process was properly dismissed. Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Rule 56. Summary judgment.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

- I. In General.
- III. Propriety of Summary Judgment.
  - A. In General.
  - B. Particular Types of Actions, etc.
  - C. Cases in Which Summary Judgment Held Proper.
  - D. Cases in Which Summary Judgment Held Improper.
- IV. Burden on Motion for Summary Judgment.
- V. Function of Trial Court.
- VI. Evidence on Motion.
  - A. In General.
  - B. Form of Affidavits and Other Evidence.
- VIII. Time of Motion and Hearing.
- IX. Notice.
- X. Service and Filing of Affidavits.
- XIII. Appeals.

I. IN GENERAL.

Conversion of § 1A-1, Rule 10(c) Motion to Motion for Summary Judgment. — Where affidavits considered by the trial court were not incorporated by reference into the pleadings pursuant to Rule 10(c), the motion to dismiss was converted into a motion for summary judgment. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996).

Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions, etc. — In accord with ninth paragraph in main volume. See King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994).

When a trial court considers matters outside the pleadings, a motion under Rule 12 is automatically converted into a motion for summary judgment. N.C. Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996).

Summary Judgment for Nonmovant. — Although plaintiffs filed motion for summary judgment, trial court entered summary judgment for defendants. When appropriate, summary judgment may be rendered against the party moving for such judgment. Coulter v. City of Newton, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

Pleadings Deemed Amended. — Where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Because the plaintiffs' summary judgment motion went only to liability, the trial court had the power to render summary judgment for the defendants with respect to liability notwithstanding the procedural defects in the defendants' summary judgment motion. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Entry of Summary Judgment. — The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a § 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the fact of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Distinction Between Motion to Dismiss and Summary Judgment. — The distinction between a § 1A-1, Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a § 1A-1, Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to Rule 50 or this rule may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in Pulley v. Rex Hosp., 326 N.C. 701, 392 S.E.2d 380 (1990); Barclays American/Leasing, Inc. v. North Carolina Ins. Guar. Ass'n, 99 N.C. App. 290, 392 S.E.2d 772 (1990); Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Jones Cooling & Heating, Inc. v. Booth, 99 N.C. App. 757, 394 S.E.2d 292 (1990);

Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990); Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991); Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151 (1991); Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991); Rogers v. T.J.X. Cos., 329 N.C. 226, 404 S.E.2d 664 (1991); Easterwood v. Burge, 103 N.C. App. 507, 405 S.E.2d 787 (1991); Diorio v. Penny, 103 N.C. App. 407, 405 S.E.2d 789 (1991); Triad Bank v. Educational Consultants, Inc., 103 N.C. App. 483, 405 S.E.2d 800 (1991); Isbey v. Cooper Cos., 103 N.C. App. 774, 407 S.E.2d 254 (1991); Anders v. Hyundai Motor Am. Corp., 104 N.C. App. 61, 407 S.E.2d 618 (1991); Gray v. Small, 104 N.C. App. 222, 408 S.E.2d 538 (1991); Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991); Rose v. Steen Cleaning, Inc., 104 N.C. App. 539, 410 S.E.2d 221 (1991); Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992); Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Whiteside v. Lawyers Sur. Corp., 107 N.C. App. 230, 418 S.E.2d 829 (1992); Thomco Realty, Inc. v. Helms, 107 N.C. App. 224, 418 S.E.2d 834 (1992); Catawba County Horsemen's Ass'n v. Deal, 107 N.C. App. 213, 419 S.E.2d 185 (1992); Canady v. Mann, 107 N.C. App. 252, 419 S.E.2d 597 (1992); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992); Kirkland v. National Civic Assistance Group, Inc., 108 N.C. App. 326, 423 S.E.2d 822 (1992); AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc., 108 N.C. App. 611, 425 S.E.2d 427 (1993); McMurry v. Cochrane Furn. Co., 109 N.C. App. 52, 425 S.E.2d 735 (1993); Smith v. State Farm Fire & Cas. Co., 109 N.C. App. 276, 426 S.E.2d 457 (1993); Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993); Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dickens v. Thorne, 110 N.C. App. 39, 429 S.E.2d 176 (1993); Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 429 S.E.2d 583 (1993); Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993); APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); L.B. Best Furn. Distribs., Inc. v. Capital Delivery Serv., Inc., 111 N.C. App. 405, 432 S.E.2d 437 (1993); Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 432 S.E.2d 915 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Butz v. Holder, 112 N.C. App. 116, 434 S.E.2d 862 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); Gregory v. Floyd, 112 N.C. App. 470, 435 S.E.2d 808 (1993); Phelps v. Vassey, 113 N.C. App. 132, 437 S.E.2d 692 (1993); First Citizens Bank & Trust Co. v. McLamb, 112 N.C. App. 645, 439 S.E.2d 166 (1994); Varner v. Bryan, 113 N.C. App. 697 440 S.E.2d 295 (1994); McKeithan v. CSX Transp., Inc., 113 N.C. App. 818, 440 S.E.2d 312 (1994); DOT v. Idol, 114 N.C. App. 98, 440 S.E.2d 863 (1994); Dunleavy v. Yates Constr. Co., 114 N.C. App. 196, 442 S.E.2d 53 (1994); Coffin v. ISS Oxford Servs., Inc., 114 N.C. App. 802, 443 S.E.2d 352 (1994); Weber v. Holland, 115 N.C. App. 160, 443 S.E.2d 746 (1994); Felts v. Hoskins, 115 N.C. App. 715, 446 S.E.2d 110 (1994); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994); Kennedy v. Guilford Technical Community College, 115 N.C. App. 581, 448 S.E.2d 280 (1994); Echols v. Zarn, Inc., 116 N.C. App. 364, 448 S.E.2d 289 (1994); Top Line Constr. Co. v. J.W. Cook & Sons, 118 N.C. App. 429, 455 S.E.2d 463 (1995); Eastern Appraisal Servs., Inc. v. State, 118 N.C. App. 692, 457 S.E.2d 312 (1995); Farrelly v. Hamilton Square, 119 N.C. App. 541, 459 S.E.2d 23 (1995); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995); Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995); Howard v. Jackson, 120 N.C. App. 243, 461 S.E.2d 793 (1995); Aune v. University of N.C., 120 N.C. App. 430, 462 S.E.2d 678 (1995); Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995); Board of Educ. v. Seagle, 120 N.C. App. 566, 463 S.E.2d 277 (1995), cert. denied, 343 N.C. 509, 471 S.E.2d 63 (1996); Craven County Bd. of Educ. v. Boyles, 343 N.C. 87, 468 S.E.2d 50 (1996); Young ex rel. Young v. Fun Services-Carolina, Inc., 122 N.C. App. 157, 468 S.E.2d 260 (1996); Mahoney v. Ronnie's Road Serv., 122 N.C. App. 150, 468 S.E.2d 279 (1996); Nifong v. C.C. Mangum, Inc., 121 N.C.

App. 767, 468 S.E.2d 463 (1996); Thompson v. Three Guys Furn. Co., 122 N.C. App. 340, 469 S.E.2d 583 (1996); Rose v. Isenhour Brick & Tile Co., 344 N.C. 153, 472 S.E.2d 774 (1996); Denning-Boyles v. WCES, Inc., 123 N.C. App. 409, 473 S.E.2d 38 (1996); Williams v. City of Durham, 123 N.C. App. 595, 473 S.E.2d 665 (1996); Rahim v. Truck Air of Carolinas, Inc., 123 N.C. App. 609, 473 S.E.2d 688 (1996); March v. Town of Kill Devil Hills, 125 N.C. App. 151, 479 S.E.2d 252 (1996).

Quoted in Muther-Ballenger v. Giffin Elec. Consultants, Inc., 100 N.C. App. 505, 397 S.E.2d 247 (1990); Busby v. Simmons, 103 N.C. App. 592, 406 S.E.2d 628 (1991); Mitchell v. Golden, 107 N.C. App. 413, 420 S.E.2d 482 (1992); Eury v. Nationwide Mut. Ins. Co., 109 N.C. App. 303, 426 S.E.2d 442 (1993); Beavers v. Federal Ins. Co., 113 N.C. App. 254, 437 S.E.2d 881, cert. denied, 336 N.C. 602, 447 S.E.2d 384 (1994); Andersen v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994); Universal Leaf Tobacco Co. v. Oldham, 113 N.C. App. 490, 439 S.E.2d 179 (1994); McLeod v. Nationwide Mut. Ins. Co., 115 N.C. App. 283, 444 S.E.2d 487, cert. denied, 337 N.C. 694, 448 S.E.2d 528 (1994); Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995); Collins Coin Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994).

Stated in Bass v. North Carolina Farm Bureau Mut. Ins. Co., 100 N.C. App. 728, 398 S.E.2d 47 (1990); Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487 (1992); Watson Elec. Constr. Co. v. City of Winston-Salem, 109 N.C. App. 194, 426 S.E.2d 420 (1993); Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993); Courts v. Annie Penn Mem. Hosp., 111 N.C. App. 134, 431 S.E.2d 864 (1993); Hales v. North Carolina Ins. Guar. Ass'n, 111 N.C. App. 892, 433 S.E.2d 468 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993); Nicholson v. County of Onslow, 116 N.C. App. 439, 448 S.E.2d 140 (1994).

Cited in United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990); Kaplan v. First Union Nat'l Bank, 99 N.C. App. 570, 393 S.E.2d 344 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990); Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990); Brooks v. Hackney, 100 N.C. App. 562, 397 S.E.2d 361 (1990); Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990); Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990); Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 101 N.C. App. 1, 398 S.E.2d 889 (1990); Dale v. Town of Columbus, 101 N.C. App. 335, 399 S.E.2d 350 (1991); Bell Arthur Water Corp. v. DOT, 101 N.C. App. 305, 399 S.E.2d 353 (1991); Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 398 S.E.2d 40 (1990); Suarez v. Food Lion, Inc., 100 N.C. App. 700, 398 S.E.2d 60 (1990); HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990); Commonwealth Land Title Ins. Co. v. Stephenson, 101 N.C. App. 379, 399 S.E.2d 380 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 329 N.C. 646, 407 S.E.2d 178 (1991); Vulcan Materials Co. v. Iredell County, 103 N.C. App. 779, 407 S.E.2d 283 (1991); North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991); Pulliam v. City of Greensboro, 103 N.C. App. 748, 407 S.E.2d 567 (1991); Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991); Yates v. Haley, 103 N.C. App. 604, 406 S.E.2d 659 (1991); Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 412 S.E.2d 97 (1991); Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277 (1992); IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354 (1992); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993); Black v. Western Carolina Univ., 109 N.C. App. 209, 426 S.E.2d 733 (1993); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Keene Convenient Mart, Inc. v. SSS Band Backers, 109 N.C. App. 384, 427 S.E.2d 322 (1993); Foster v. Federal Emergency Mgt. Agency, 984 F.2d 128 (4th Cir. 1993); Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993); Boyd v. Nationwide Mut. Ins. Co., 108 N.C. App. 536, 424 S.E.2d 168 (1993); Gibson v. Hunsberger, 109 N.C. App. 671, 428 S.E.2d 489 (1993); Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 (1993); Nationwide Mut. Ins. Co. v. Anderson, 111 N.C. App. 248, 431 S.E.2d 552

(1993); Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460 (1993); Huffaker v. Holley, 111 N.C. App. 914, 433 S.E.2d 474 (1993); Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993); Nationwide Mut. Ins. Co. v. Public Serv. Co., 112 N.C. App. 345, 435 S.E.2d 561 (1993); Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993); Wilkinson v. SRW/Cary Assocs., 112 N.C. App. 846, 437 S.E.2d 3 (1993); Padgett v. J.C. Penney Co., 112 N.C. App. 842, 437 S.E.2d 401 (1993); University of N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892, cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); State Farm Mut. Auto. Ins. Co. v. Branch, 114 N.C. App. 234, 441 S.E.2d 586 (1994); Powell v. S & G Prestress Co., 114 N.C. App. 319, 442 S.E.2d 143 (1994); Williams v. Paley, 114 N.C. App. 571, 442 S.E.2d 558 (1994); Kraft Foodservice, Inc. v. Hardee, 114 N.C. App. 811, 443 S.E.2d 106 (1994); Tharrington v. Sturdivant Life Ins. Co., 115 N.C. App. 123, 443 S.E.2d 797 (1994); Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994); Zenns v. Hartford Accident & Indem. Co., 115 N.C. App. 482, 444 S.E.2d 692, cert. denied, 337 N.C. 699, 448 S.E.2d 541 (1994); Hales v. North Carolina Ins. Guar. Ass'n, 337 N.C. 329, 445 S.E.2d 590 (1994); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994); Adams v. Beard Dev. Corp., 116 N.C. App. 105, 446 S.E.2d 862 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995); Miller v. Miller, 117 N.C. App. 71, 450 S.E.2d 15 (1994); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Maryland Cas. Co. v. Smith, 117 N.C. App. 593, 452 S.E.2d 318 (1995); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995); Taylor v. Brinkman, 118 N.C. App. 96, 453 S.E.2d 560 (1995); Talton v. Mac Tools, Inc., 118 N.C. App. 87, 453 S.E.2d 563 (1995); Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995); James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995); Babb v. Harnett County Bd. of Educ., 118 N.C. App. 291, 454 S.E.2d 833 (1995); Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995); Eastern Appraisal Servs., Inc. v. State, 118 N.C. App. 692, 457 S.E.2d 312 (1995); Moore v. City of Creedmoor, 120 N.C. App. 27, 460 S.E.2d 899 (1995); Griffin v. Sweet, 120 N.C. App. 166, 461 S.E.2d 32 (1995); Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995); Wilhelm v. City of Fayetteville, 121 N.C. App. 87, 464 S.E.2d 299 (1995); Carolina Water Serv., Inc. v. Town of Atlantic Beach, 121 N.C. App. 23, 464 S.E.2d 317 (1995); Gibson v. Mutual Life Ins. Co., 121 N.C. App. 284, 465 S.E.2d 56 (1996); Roberts v. Madison County Realtors Ass'n, 121 N.C. App. 233, 465 S.E.2d 328 (1996); Naegele Outdoor Adv., Inc. v. Hunt, 121 N.C. App. 205, 465 S.E.2d 549 (1996); Caswell Realty Assocs. v. Andrews Co., 121 N.C. App. 483, 466 S.E.2d 310 (1996); Ruff v. Reeves Bros., 122 N.C. App. 221, 468 S.E.2d 592 (1996); G. Adrian Stanley & Assocs. v. Risk & Ins. Brokerage Corp., 123 N.C. App. 532, 473 S.E.2d 345 (1996); Parker v. Erixon, 123 N.C. App. 383, 473 S.E.2d 421 (1996); Martin v. Continental Ins. Co., 123 N.C. App. 650, 474 S.E.2d 146 (1996); J.M. Smith Corp. v. Matthews, 123 N.C. App. 771, 474 S.E.2d 798 (1996); Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996); Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996); City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996); Jenkins v. Lake Montonia Club, Inc., 125 N.C. App. 102, 479 S.E.2d 259 (1996); Daniel v. City of Morganton, 125 N.C. App. 47, 479 S.E.2d 263 (1996); Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997); Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997); Royal Ins. Co. of Am. v. Cato Corp., 125 N.C. App. 544, 481 S.E.2d 383 (1997); Nick v. Baker, 125 N.C. App. 568, 481 S.E.2d 412 (1997); Richardson v. McCracken Enters., — N.C. App. —, 485 S.E.2d 844 (1997)

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Especially in Negligence Cases. — Although North Carolina appellate courts have consistently held that summary judgment is rarely appropriate in negligence actions, summary judgment should be entered where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim. Thus, summary judgment was appropriate in action arising from automobile collision. Patterson v. Pierce, 115 N.C. App. 142, 443 S.E.2d 770, cert. denied, 337 N.C. 803, 449 S.E.2d 749 (1994).

Summary Judgment to Be Granted Only Where No Genuine Issue of Material Fact Is Presented. —

Evidence held insufficient to establish any genuine issue of material fact. Long v. Vertical Technologies, Inc., 113 N.C. App. 598, 439 S.E.2d 797 (1994).

And Where a Party Is Entitled to Judgment, etc. —

In accord with first paragraph in main volume. See Vance v. Wiley T. Booth, Inc., 112 N.C. App. 600, 436 S.E.2d 256 (1993); Padgett v. J.C. Penney Co., 112 N.C. App. 842, 437 S.E.2d 401 (1993).

The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

When defendant establishes a complete defense, etc. —

A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Plaintiff's bare assertions, etc. —

Where plaintiff made a motion for summary judgment, which was denied, and later plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion, the trial court erred by granting plaintiff's second motion for summary judgment. Taylorsville Fed. Savs. & Loan Ass'n v. Keen, 110 N.C. App. 784, 431 S.E.2d 484 (1993).

Appellate Conclusion Improper. — Where Court of Appeals majority opinion included a paragraph that concluded that a balancing of the equities favored denial of relief to plaintiff, such a conclusion was improper at the summary judgment stage. Roberts v. Madison County Realtors Ass'n, 344 N.C. 394, 474 S.E.2d 783 (1996).

Judgment on Pleadings Treated As Summary Judgment. — Where matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion was treated as if it was a motion for summary judgment. Helms v. Holland, 124 N.C. App. 629, 478 S.E.2d 513 (1996).

B. Particular Types of Actions, etc.

Summary judgment is an appropriate procedure, etc. —

Pine Knoll Ass'n v. Cardon, — N.C. App. —, 484 S.E.2d 446 (1997).

Summary judgment may be granted in a negligence action even though summary judgment is seldom appropriate in a negligence case where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence. Lavelle v. Schultz, 120 N.C. App. 857, 463 S.E.2d 567 (1995).

Termination of Parental Rights. — Article 24B of Chapter 7A (§ 7A-289.22 et seq.) does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Assignments. — Generally, the interpretation of an assignment is governed by rules applicable to the interpretation of a contract. If there is no ambiguity regarding the subject matter of the assignment, the plaintiff's intent can be interpreted without resort to extrinsic evidence and summary judgment may be appropriate. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40), this rule, and § 1A-1, Rules 12 and 23, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Lack of Verification Pursuant to § 1A-1, Rule 23(b). — Because the verification requirement in § 1A-1, Rule 23(b) is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

C. Cases in Which Summary Judgment Held Proper.

No Genuine Issue as to Inflicted Injury. —

Summary judgment was appropriate where plaintiff's claim did not meet the test in *Woodson v. Rowland,* 329 N.C. 330, 407 S.E.2d 222 (1991), requiring that the plaintiff show that the defendant engaged in misconduct he knew was substantially certain to cause serious injury. Henderson v. Henderson, 121 N.C. App. 752, 468 S.E.2d 454 (1996).

Libel Claim. — Trial court did not err in granting defendants' motion for summary judgment on plaintiffs' libel claim. Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 432 S.E.2d 428 (1993), aff'd, 339 N.C. 602, 453 S.E.2d 146 (1995).

Intentional Infliction of Emotional Distress. — Where one plaintiff could place no time period in which defendant allegedly intentionally inflicted emotional distress, and where she was unable to place a day, month or year on any of the specific events she alleged, there was simply no evidence to indicate that any of the alleged incidents regarding plaintiff took place within the three-year statute of limitations period, and the trial court did not err in granting summary judgment to defendant against that plaintiff. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990), modified on other grounds, 331 N.C. 73, 412 S.E.2d 22 (1992).

Action to Quiet Title Based on Fraud. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary; therefore, the judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Application for Certificate of Need. — Where both parties forecast evidence to support recommendation by the administrative law judge and final agency decision which were contrary, a genuine issue of material fact existed regarding hospital's application for a certificate of need, a contested case hearing would be required, and final agency inappropriately granted summary judgment for hospital. Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, — N.C. —, 485 S.E.2d 294 (1997).

An application for certificate of need must comply with all review criteria, and where an application failed to show that it satisfied mandatory criteria, administrative law judge did not err in recommending summary judgment against applicant. Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, — N.C. —, 485 S.E.2d 294 (1997).

Evidence Not Sufficient. — Where plaintiff's evidence was properly excluded because service was not timely and plaintiff offered nothing to counter defendant's evidence, summary judgment for the defendant was proper. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995).

D. Cases in Which Summary Judgment Held Improper.

Deed of Trust. — Where there was a genuine issue of fact as to the extent to which deed of trust secured amounts additional to purchase price of shopping center property summary judgment was improper. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Automobile Accident. — In action for damages arising out of automobile accident, trial court erred in granting defendant's motion for summary judgment. Mobley v. Estate of Johnson, 111 N.C. App. 422, 432 S.E.2d 425 (1993).

In an action for constructive fraud and constructive trust, summary judgment for defendant attorney was precluded by a genuine issue of material fact as to the existence of an attorney-client relationship at the time a referral fee arrangement was made. Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990).

Intentional Infliction of Emotional Distress. — Where plaintiff's allegations were sufficient to establish that defendant's behavior constituted more than insults or unflattering opinions the trial court erred in granting summary judgment in favor of defendant with regard to suit alleging intentional inflictions of emotional distress, as there were sufficient facts alleged to raise a question of whether defendant's conduct was extreme and outrageous. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990).

Libel and Slander. — There was ample evidence to withstand summary judgment in the record of libel and slander case that defendant's statement was false and made with actual malice; defendant's firing of plaintiff within days after newspaper published a letter from plaintiff's mother in support of defendant's political opponent, and the vehement character of the statement to the newspaper were some evidence of defendant's ill-will toward plaintiff. Plaintiff also introduced evidence that he was competent at his job as assistant district attorney. Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134 (1990).

Summary judgment was improper where plaintiffs forecast evidence that purchasing corporation was a "mere continuation" of the old corporation. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Where plaintiffs had reasonable notice that their agreement to charge pharmaceuticals to defendant's open account was terminated, defendant was entitled to judgment as a matter of law; thus, the order of the trial court granting summary judgment in plaintiff's favor was reversed. J.M. Smith Corp. v. Matthews, 123 N.C. App. 771, 474 S.E.2d 798 (1996).

Mitigation of Damages. — Defendant's affidavit presented a genuine issue of material fact as to the adequacy of plaintiff's attempted mitigation of damages; therefore, the trial court incorrectly granted summary judgment on the issue of damages. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Piercing the Corporate Veil. — Because only one of several factors that can justify a court in piercing the corporate veil and treating a corporation as the alter ego of its officers or stockholders was established without contradiction by the materials in the record, the court correctly denied plaintiff's motion for summary judgment on the issue of piercing the corporate veil. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Contributory Negligence of Paper Mill Operator. — Genuine issues of fact, precluding summary judgment, existed as to whether a paper mill owner was contributorily negligent in operating a continuous digester system which the owner alleged had been improperly designed and installed by the system's manufacturer. Federal Paper Bd. Co. v. Kamyr, Inc., 101 N.C. App. 329, 399 S.E.2d 411 (1991), discretionary review denied, 328 N.C. 570, 403 S.E.2d 510 (1991).

Action for Attorney's Fees. — Where there was a genuine issue of material fact as to whether a nurse anesthetist's attorney fees were actually and necessarily incurred in connection with any threatened action seeking to hold her liable, summary judgment was not proper. Gregorino v. Charlotte-Mecklenburg Hosp. Auth., 121 N.C. App. 593, 468 S.E.2d 432 (1996).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

And Must Show Entitlement, etc. —

In accord with third paragraph in bound volume. See Lyles v. City of Charlotte, 120 N.C. App. 96, 461 S.E.2d 347 (1995).

If a defendant moves for summary judgment, etc. —

A defendant who moves for summary judgment may meet his burden by showing either that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim. Lyles v. City of Charlotte, 120 N.C. App. 96, 461 S.E.2d 347 (1995).

Movant Shifted Burden by Showing Opponent Lacked Standing. — Because defendant met its summary judgment burden by showing that there was no genuine issue of material fact due to lack of standing, the burden shifted to plaintiff. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

Showing That Opponent Cannot Produce Evidence to Support Its Claim Satisfies Burden. —

To succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Defendant may meet this burden by showing either

(1) an essential element of the nonmovant's claim is nonexistent, (2) the nonmovant cannot produce evidence to support an essential element of his claim, (3) or the nonmovant cannot surmount an affirmative defense which would bar his claim. Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 46 (1994).

V. FUNCTION OF TRIAL COURT.

As a Summary of Undisputed Facts, etc. —
Orders granting summary judgment under this rule do not normally contain detailed findings of fact. However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. Noel Williams Masonry, Inc. v. Vision Contractors, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

VI. EVIDENCE ON MOTION.

A. In General.

Where the record did not show that plaintiff objected to parol evidence in the form of affidavits submitted by the defendants, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon motions for summary judgment. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Prima Facie Evidence of Negligent Supervision. — Plaintiff's forecast of evidence was sufficient to demonstrate that she could make out a prima facie case of negligent supervision. Rouse v. Pitt County Mem. Hosp., 116 N.C. App. 241, 447 S.E.2d 505 (1994), aff'd, 343 N.C. 186, 470 S.E.2d 44 (1996).

Failure to Object to Affidavits. — Even if affidavits of two defendants contained evidence of settlement negotiations made inadmissible by § 8C-1, Rule 408, plaintiff could not assert their admission as error on appeal where plaintiff failed to object or move to strike the affidavits. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

B. Form of Affidavits and Other Evidence.

Where Requirements of Section (e) Are Met. —
Affidavits used by either party must comply with the requirements of this rule, that is, they must be based on personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated in the affidavit. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

VIII. TIME OF MOTION AND HEARING.

Hearing on Motion While Discovery Is Pending, etc. —
In accord with the main volume. See Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

IX. NOTICE.

Noncompliance with subsection (c) of this rule may be waived by the person entitled to the notice. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

The person entitled to notice pursuant to subsection (c) of this rule waives it when he participates in the hearing but does not object to the improper notice. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Waiver of Notice. — The notice required by this rule may be waived by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party. Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

No Reversible Error Where Defendants Not Prejudiced by Untimely Notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to § 1A-1, Rule 6(e) and section (c) of this rule. Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. Symons Corp. v. Quality Concrete Constr., Inc., 108 N.C. App. 17, 422 S.E.2d 365 (1992).

X. SERVICE AND FILING OF AFFIDAVITS.

Failure to File Opposing Affidavits Prior to Day of Hearing. — This rule specifically provides that the moving party is required to submit supporting affidavits which would set forth the moving party's basis for the motion and that opposing affidavits should be filed prior to the day of the hearing. Where plaintiff did not attempt to present opposing affidavits until the day of the hearing, her argument that she was not required to respond to defendant's motion for summary judgment until defendant had carried out his burden and the basis for his motion became clear was meritless. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

When Filing on Date of Hearing Permitted. — Despite the specific language of section (c) of this rule requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

If a request for permission to file affidavits in support of a motion under this rule is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Nothing in subsection (c) or any other rule specifically requires "filing" of the opposing affidavit prior to the day of the summary judgement hearing; thus, affidavit filed on the day of the hearing was timely. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 344 N.C. 713, 477 S.E.2d 166 (1996).

Plaintiff complied with subsection (d) by filing affidavit within five days of service with the court on the day of the hearing. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 344 N.C. 713, 477 S.E.2d 166 (1996).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to that date, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

XIII. APPEALS.

Order Setting Aside Summary Judgment Is Interlocutory. — The denial of a motion for summary judgment is interlocutory and nonappealable unless a substantial right of one of the parties is involved. Denegar v. City of Charlotte, 115 N.C. App. 166, 443 S.E.2d 778 (1994).

Rule 57. Declaratory judgments.

CASE NOTES

Applied in Alphatronix, Inc. v. Pinnacle Micro, Inc., 814 F. Supp. 455 (M.D.N.C. 1993).

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered. (1967, c. 954, s. 1; 1993 (Reg. Sess., 1994), c. 594, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 594, s. 1, which rewrote this section, was effective October 1, 1994, and was applicable to all judgments subject to entry on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 594, s. 1, which amended this section, was effective October 1, 1994, and applicable to all judgments subject to entry on or after that date.

CASE NOTES

Requirements for Completed Entry of Judgment. — Paragraph three of this rule specifies three separate events which must occur before entry of judgment is complete. First, the clerk must receive an order from the trial judge for the entry of judgment. Second, the judgment must be filed. Third, the clerk must mail notice of filing to all parties. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Contrary Direction. — An instruction by the court that the prevailing party's attorney is to draft the order is a contrary direction. Therefore, because of the trial court's contrary direction, the automatic entry provisions of paragraph one of this rule do not operate to determine when entry of judgment occurred. In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992).

It is essential that the notation of entry of judgment include at least the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. The notation here lacks these specifics and is therefore insufficient to constitute entry of judgment under Rule 58. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Inadequate Notation. — In order to make a notation of "such verdict" as was returned in this case, the clerk had to specify more than the mere words "jury verdict." An adequate notation would have reflected much of the information on the actual jury verdict form, including, at minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Announcement in Open Court Is Not Entry of Judgment. — Announcement of judgment in open court merely constitutes the rendition of judgment, not its entry; the court of appeals has no authority to hear an appeal where there has been no entry of judgment. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Trial court's announcement of judgment in open court, where the judgment was rendered after October 1, 1994, was the mere rendering of judgment, not the entry of judgment. Entry of judgment occurred when the judgment was reduced to writing, signed by the judge, and filed with the clerk of court; thus, the judgment was not appealable and also not enforceable. Worsham v. Richbourg's Sales & Rentals, Inc., 124 N.C. App. 782, 478 S.E.2d 649 (1996).

Notice of Appeal. — It was evident that the parties only had fair notice of the judgment at the time the written judgment was filed where only after that time did the parties take action to settle the record on appeal. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Appeal Dismissed in Absence of Record of Notice. — Where a judgment was prepared and filed in this case but there was no evidence in the record on appeal that notice of filing was mailed to the parties and the judgment does not exhibit a time of mailing constituting prima facie evidence of mailing notice, judgment was not properly entered and appeal was dismissed for lack of jurisdiction. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Judgment Incomplete for Purposes of Appeal Until Entry. — Not only does the trial court have the authority to subsequently enter a written judgment which conforms to its rendered judgment, entry of judgment by the trial court is the event which vests jurisdiction in the appellate court, and the judgment is not complete for the purpose of appeal until its entry. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Notice of appeal given after the general terms of the judgment are announced in open court is, alone, not sufficient to vest jurisdiction in the appellate court. Searles v. Searles, 100 N.C. App. 723, 398 S.E.2d 55 (1990).

Where the jury announced its verdict in open court, it "rendered judgment" according to § 1A-1, Rule 3(a) and this rule, and oral notice of appeal was a proper procedure. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Factors in Analysis of Whether an Entry of Judgment Has Occurred. — The language of this rule clearly establishes that entry of judgment occurs when the clerk makes some notation in the minutes. In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. Relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interrelationship Between Rules. — The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between § 1A-1, Rule 54 and this rule than from the express language of this rule itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Rendering of Judgment Held Not Entry of Judgment. — In a custody case, where the trial court announced in open court that the previous decree would receive full faith and credit and custody would not change, the court rendered judgment that day on the custody issue, but the court did not enter judgment, as the court directed counsel for defendant to draw the order and the parties continued to negotiate on visitation so the rendering of judgment did not constitute entry of judgment. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of judgment occurred when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, not when the jury returned its verdict and the assistant clerk wrote "jury verdict" on the court calendar. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Where judge instructed clerk to note judgment on children's paternity in minutes, valid entry of judgment occurred at this time, not at later date when judge signed written order of paternity. In re Estates of Barrow, 122 N.C. App. 717, 471 S.E.2d 669 (1996).

Adoption of Draft Order and Proposed Findings. — In a custody case, where trial court directed counsel for defendant to draft an order reflecting its decision, this order required findings of fact supporting the court's conclusion that there had been no material change of circumstances warranting a modification of the custody order. Fair notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and proposed findings. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Each of the three paragraphs in this rule declares that entry of judgment occurs when the clerk makes some notation in the minutes. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

In cases where entry of judgment cannot be determined from the express language of this rule, fair notice concerns indicate that "entry" occurs only after draft orders or judgments are submitted to and adopted by the court. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of Judgment in a Divorce Action. — Because the pronouncement of divorce judgment was not entered within the explicit meaning of this Rule, and judgment can be entered only after the requisite findings of fact have been adopted in a divorce action under § 50-10, entry of judgment of absolute divorce did not occur until counsel submitted the judgment to the court and the court signed the judgment. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Quoted in Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994).

Stated in Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96 (1991); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. In General.
II. Time for Serving Motions and Affidavits.
III. Altering or Amending Judgments.

I. IN GENERAL.

Refusal to Award New Trial Upheld. —

Where there was nothing in the record to indicate that jury award was influenced by passion or prejudice, it was not a manifest abuse of discretion for the trial judge to uphold the jury's verdict and to deny plaintiff's motion for a new trial. McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527, cert. denied, — N.C. —, 458 S.E.2d 183, review denied, 340 N.C. 114, 456 S.E.2d 317 (1995).

Trial court's order granting a new trial which contained neither findings nor explication reflecting the grounds for the court's action lacked any basis upon which to conduct appellate review and was reversed. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Evaluation of Jury Award. — Because a motion for a new trial must be considered on the basis of the jury award, it is error to base an evaluation of the motion on an amount different from that award. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

In deciding a party's motion for a new trial under this Rule, the trial court is limited to a determination of whether the jury's award of damages is inadequate or the jury's verdict is otherwise in error. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

Trial judge has discretionary power to set aside an award, etc. —

In accord with the main volume. See Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992).

Remand for New Trial on Damage Issues. — Where the trial judge remarked that the maximum amount of damages that could have been available under the evidence presented was $45,000, but he only remitted the award to $60,000, which was still excessive under the evidence presented and constituted a manifest abuse of discretion, a remand for a new trial on the issue of damages was required. Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993).

Where the evidence showed that

defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by § 55-15-02(a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

Granting New Trial Based on Misapprehension of Law. — If trial court granted a motion for new trial on the belief that by admitting fault, defendant had necessarily admitted plaintiff suffered damages which were the proximate result of defendant's fault, the basis of its action would be a misapprehension of law and its order would constitute reversible error. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Grant of New Trial Based on Erroneous Instruction of Lien Amount. — Instruction of an erroneous amount for workers' compensation lien was an irregularity which prevented defendant from having a fair trial and the court's failure to grant a new trial on these grounds was a substantial miscarriage of justice. Edwards v. Hardy, — N.C. App. —, 483 S.E.2d 724 (1997).

Time in Which Court May Act. — Subsection (d) does not require that sua sponte action by the trial court be accompanied by a statement of the reasons therefor only after entry of judgment, but rather sets forth the maximum time following entry of judgment within which the court is statutorily authorized to act upon its own initiative. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Timing of Judgment on Motion. — This rule requires that a motion for a new trial or to amend a judgment be made within ten days of the judgment, but does not prescribe the time for judicial action on the motion; therefore, when defendant moved to amend the judgment within the ten-day window provided by subsection (e), the trial court had authority to enter its supplemental judgment on that motion nearly a month later. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

Punitive Damages Held Not Excessive. — Where plaintiff clearly presented sufficient evidence to prove he was entitled to an award of punitive damages, upon a strict review of the record it could not be said as a matter of law that the trial court erred in denying defendant's motion for a new trial on the grounds of excessive punitive damages. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

No Abuse of Discretion Found. — No abuse of discretion was found where a jury awarded $225,000.00 against an insurance company for bad faith refusal to settle. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Applied in Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Pate v. Eastern Insulation Serv. of New Bern, Inc., 101 N.C. App. 415, 399 S.E.2d 338 (1991); Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991); Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Guilford County Planning & Dev. Dep't v. Simmons, 115 N.C. App. 87, 443 S.E.2d 765 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); Chaney v. Young, 122 N.C. App. 260, 468 S.E.2d 837 (1996); Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996); Elrod v. Elrod, 125 N.C. App. 407, 481 S.E.2d 108 (1997).

Stated in Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996).

Cited in Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Daum ex rel. Henderson v. Lorick Enters., Inc., 105 N.C. App. 428, 413 S.E.2d 559 (1992); McClain v. Otis Elevator Co., 106 N.C App. 45, 415 S.E.2d 78 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d

852 (1993); Giles ex rel. Giles v. Smith, 112 N.C. App. 508, 435 S.E.2d 832 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Chee v. Estes, 117 N.C. App. 450, 451 S.E.2d 349 (1994); Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996); Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996); Lassiter v. English, — N.C. App. —, 485 S.E.2d 840 (1997).

II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

Service vs. Filing. — This rule requires that the motion be served, not filed, within ten days after entry of judgment. Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589, cert. denied, 340 N.C. 114, 455 S.E.2d 663, aff'd per curiam, 342 N.C. 403, 464 S.E.2d 44 (1995).

Defendant's Motion Held Untimely. — Where, by the express terms of the parties' divorce agreement, defendant had at least constructive knowledge that one of plaintiff's possible alternatives to recover support payments included foreclosure on defendant's property mentioned in the agreement, there was no merit in defendant's contention that this constituted newly discovered evidence which by due diligence he could not have discovered in time to move for a new trial under section (b) of this Rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

III. ALTERING OR AMENDING JUDGMENTS.

Amendment upon Motion of the Court. — A trial court has the power to amend its judgment on its own motion within the ten-day period provided by section (e) of this rule. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

This rule is an inappropriate vehicle to challenge the denial of a Rule 60 motion. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Trial court erred in not granting motion to amend or open judgment where arbitrator failed to disclose numerous social, business, and professional relationships with partners in law firm representing insurance company. William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed'n, 123 N.C. App. 97, 472 S.E.2d 346 (1996).

Rule 60. Relief from judgment or order.

CASE NOTES

I. In General.
II. Relief under Subsection (a).
III. Relief under Subsection (b).
  A. In General.
  B. Mistake, Inadvertence, Surprise and Excusable Neglect.
    1. In General.
    2. Relief Held Proper.
    3. Relief Held Improper.
  D. Fraud, Misrepresentation and Misconduct of Adverse Party.
  E. Other Reasons Justifying Relief under Subdivision (b)(6).
  F. Void Judgments.

I. IN GENERAL.

Claim That Judgment Is Defective Not Permitted After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-

Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991); State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991); Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991); Hoolapa v. Hoolapa, 105 N.C. App. 230, 412 S.E.2d 112 (1992); Loftis v. Reynolds, 105 N.C. App. 697, 414 S.E.2d 378 (1992); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Middleton, 114 N.C. App. 799, 443 S.E.2d 110 (1994); Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995); Stephens v. John Koenig, Inc., 119 N.C. App. 323, 458 S.E.2d 233 (1995); Chaney v. Young, 122 N.C. App. 260, 468 S.E.2d 837 (1996); Banner v. Hatcher, 124 N.C. App. 439, 477 S.E.2d 249 (1996).

Quoted in Waldrop v. Young, 104 N.C. App. 294, 408 S.E.2d 883 (1991); In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995); Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996).

Stated in Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995).

Cited in Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Hill v. Hanes Corp., 102 N.C. App. 46, 401 S.E.2d 768 (1991); Metts v. Piver, 102 N.C. App. 98, 401 S.E.2d 407 (1991); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Smith v. Smith, 334 N.C. 81, 431 S.E.2d 196 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Hooper v. Pizzagalli Constr. Co., 112 N.C. App. 400, 436 S.E.2d 145 (1993); Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc., 113 N.C. App. 476, 439 S.E.2d 221 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994); Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589 (1995); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995); Sotelo v. Drew, 123 N.C. App. 464, 473 S.E.2d 379 (1996); Hieb v. Lowery, 344 N.C. 403, 474 S.E.2d 323 (1996); VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997); Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997).

II. RELIEF UNDER SUBSECTION (a).

Limit on Court's Power. — Subsection (a) permits the courts to correct clerical errors or omissions; however, courts do not have the power under this section to affect the substantive rights of the parties or to correct substantive errors in their decisions. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

Amended order made substantive changes in the original order and was not an attempt to correct clerical errors; therefore, the amended order was hereby vacated as outside the authority of subsection (a) and the original order remained in full force and effect. Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn, 111 N.C. App. 822, 433 S.E.2d 782 (1993).

No Time Limit. — Defendant was not barred from seeking correction by the doctrine of laches because subsection (a) provides no time limit for the correction of clerical errors. Gordon v. Gordon, 119 N.C. App. 316, 458 S.E.2d 505 (1995).

Effect of Clerical Correction. — Where plaintiff's unqualified duty under the conclusions of law and the decretal portion of order was to continue making payments to defendant, clerical correction did not alter the effect of the original order. Gordon v. Gordon, 119 N.C. App. 316, 458 S.E.2d 505 (1995).

By changing the incorrect date of entry of judgment to a date other than the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal; this rule does not vest the trial court with such authority. Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993).

III. RELIEF UNDER SUBSECTION (b).

A. In General.

The purpose of subsection (b) of this rule is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

To proceed under subsection (b) of this rule requires an initial determination of whether a notice of dismissal constitutes a "judgment, order or proceeding." Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Motion Under Subsection (b) of This Rule Cannot Be a Substitute for Appellate Review, etc. —

In accord with paragraph in main pamphlet. See Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995).

Because defendant attempted to use a subdivision (b)(6) motion as a substitute for appellate review, the trial court's order denying defendant's motion was affirmed. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Amendment of Voluntary Dismissal. — A voluntary dismissal under § 1A-1, Rule 41(a)(1) can be amended pursuant to section (b) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

When Consent Judgment May Be Changed, etc. —

A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Absent a showing of fraud, mutual mistake or a lack of consent, attacks on consent judgments are controlled by Rule 60(b)(6). Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Power to Set Aside Judgment or Order Entered by Another Judge. —

A superior court judge has authority to grant relief under a subsection (b) motion without offending the rule that precludes one superior court judge from reviewing the decision of another. Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995), aff'd, — N.C. —, 474 S.E.2d 323 (1996).

Reasonable Time. — Where plaintiff's motion for reconsideration was made after the 15 days allowed under § 97-85, subsection (b) merely requires that a motion for relief from the judgment be filed within a reasonable time. Thus, the commission should have considered the motion as a subsection (b) motion for relief from the judgment. Jones v. Yates Motor Co., 121 N.C. App. 84, 464 S.E.2d 479 (1995).

Delay Held Unreasonable. — Trial court did not abuse its discretion in concluding that delay of one year in filing motion for relief under section (b) of this rule was unreasonable and in denying the motion. Brown v. Windhom, 104 N.C. App. 219, 408 S.E.2d 536 (1991).

Appellate review of a motion under section (b), etc. —

In accord with first paragraph in the main volume. See Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

In accord with second paragraph in the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Court Not Required to Make Findings of Fact. — Where the trial court denied the motion to set aside the default judgment without making findings of fact, a better practice would have been to make findings of fact when ruling on a motion under subsection (b); however, the trial court is not required to do so. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

When Court Fails to Make Findings of Fact. — Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

Court's Miscalculation of Ability to Pay Alimony Arrearages Held Error. — Where the trial court understated defendant's monthly expenses by approximately $500.00 per month and failed to include that amount in its calculation of the amount of defendant's present ability to pay alimony arrearages and prospective alimony, while this miscalculation may have had no effect on the trial court's order of specific performance, it may have had an effect on the amount defendant can reasonably afford to pay plaintiff on a monthly basis; the trial court's miscalculation in this situation was of a substantial nature and was a prejudicial error. Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Where defendants contended that a mistake was mutual in that both parties settling a wrongful death claim agreed to purchase an annuity for $300,000.00 and that both parties were mistaken as to the actual future payments that the decedent's child would receive from the annuity based on a present value of $300,000.00, as based on incorrect figures received from the annuity company, but where the settlement agreement made no representation as to the cost of the annuity to defendants, and the agreement did not set forth a present value for the settlement, but rather simply set forth the payments to be made by the defendants to decedent's wife and child, the defendants' allegation that the mistake as to the present value of the annuity was mutual was not evident in the settlement agreement. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21, the appeal was treated as a writ of certiorari. Troy v. Tucker, — N.C. App. —, 484 S.E.2d 98 (1997).

Jurisdiction. — Equitable distribution action and ancillary claim for restitution held properly dismissed for lack of personal jurisdiction over defendant where evidence failed to show that defendant purposefully established numerous contacts with this state. Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of section (b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

Relief Possible Without Motion. — [A]lthough this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Findings of Fact. — Under section (b), the trial court is not required to make findings of fact unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Along with Finding of a Meritorious Defense. —

A party moving to set aside a judgment under subdivision (b)(1) must show not only mistake, inadvertence, surprise or excusable neglect, but also the existence of a meritorious defense. Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994).

Waiver of Errors. — Errors of law alleged to have been committed by the trial court in entering the equitable distribution judgment were issues which could have been raised in the first appeal to the Court of Appeals; therefore, the trial court did not abuse its discretion in denying section (b) motion, as the record could support no other conclusion. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

2. Relief Held Proper.

Failure to Maintain Agent for Service of Process. — Where defendant corporation failed for more than eight years to maintain a registered agent in North Carolina to receive service of process, and failed, for over eight years, to notify the Secretary of State that its address had changed, there existed competent evidence in the record of inexcusable neglect that led to the entry a default judgment which could not be set aside. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

Council's failure to move for an extension of time in which to produce and deliver transcript supported a finding of excusable neglect. Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

3. Relief Held Improper.

Consent Order. — Motion under section (b)(6) of this rule should have been denied where defendant altered the agreement from what was agreed upon at trial, as each side apparently did during several redrafts. There was no finding or evidence which would lead to a conclusion that this was inadvertent; therefore, any mistake was not mutual, and a consent order incorporating the agreement could not be modified. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A finding that plaintiff received a greater percentage of the marital assets pursuant to the consent judgment would not otherwise be sufficient to render the agreement invalid, and defendant could not invoke the broad language of subdivision (b)(6) of this rule simply to obtain relief to which she was otherwise not entitled. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Subdivision (b)(6) of this rule is not a catch-all rule; in order to be entitled to relief thereunder, the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Failure to Attend Proceedings After Insurance Carrier Refused to Defend. — Where defendants were well aware that their insurance carrier refused to represent them, and counsel for plaintiff waited three months before moving for default and also sent defendants a letter stating his intention to seek default if defendants continued to fail to respond, there was sufficient time to protect their interests; accordingly, trial court's refusal to grant defendants relief from judgment for excusable neglect was not an abuse of discretion. Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

D. Fraud, Misrepresentation and Misconduct of Adverse Party.

Time for Bringing Attack on Judgment. — An attack against judgment on the basis of fraud must be brought within one year after judgment. Caswell Realty Assocs. v. Andrews Co., 121 N.C. App. 483, 466 S.E.2d 310 (1996).

E. Other Reasons Justifying Relief under Subdivision (b)(6).

Subdivision (b)(6) of this section is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Subdivision (b)(6) serves as a "grand reservoir of equitable power" by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

Subdivision (b)(6) has been referred to as a "vast reservoir of equitable power." Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

Subdivision (b)(6) Not a "Catch-All" Rule. —

Although subsection (b)(6) of this rule has often been termed "a vast reservoir of equitable power," a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist, and (2) that justice demands relief. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Two-Pronged Test. — The setting aside of a judgment pursuant to subsection (b)(6) of this rule should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. In addition to these requirements, the movant must also show that he has a meritorious defense. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Obtain Personal Jurisdiction Over Defendant. — Motion to set aside the consent judgment, although made more than six years after its entry, was based on the argument that the trial court did not have personal jurisdiction over defendant. Because a judgment entered without personal jurisdiction over a party is void, defendant's motion was not untimely because it was undisputed that defendant neither accepted service of process nor was served with process. Nye, Mitchell, Javis & Bugg v. Oates, 109 N.C. App. 289, 426 S.E.2d 291 (1993).

Waiver of Objection to Personal Jurisdiction. — Defendants were not entitled to relief from the judgment pursuant to this rule as any objection to personal jurisdiction was waived by defendant appearing at the hearing and consenting to the substitution of the administrator as party defendant and the subsequent entry of judgment against the defendants. Farm Credit Bank v. Edwards, 121 N.C. App. 72, 464 S.E.2d 305 (1995).

Where the record supported the trial court's finding that there was no evidence to show that plaintiff's attorney had actual knowledge of an address where defendant could be served, substituted service on the Secretary of State was effective, and trial court did not err in denying defendant's motion to set aside the judgment on that ground pursuant to subdivision (b)(4) of this rule. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

The lack of notice to interested party of the original incompetency proceeding would clearly justify granting relief pursuant to subsection (b)(6). In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

Motion to Amend Consent Judgment Not Allowed. — Subsection (b)(6) of this rule permits motions for relief from judgments for "[a]ny other reason justifying relief from the operation of the judgment." However, where a request for relief pursuant to subsection (b)(6) of this rule was in reality a motion to amend the Consent Judgment and that result could not be achieved by a motion under subsection (b)(6). State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Perfect Appeal. — The Superior Court's appropriate dismissal of defendant's appeal on the grounds that defendant failed to perfect it barred any discussion of the merits of the exchange rate used in the judgment; accordingly, the trial court properly denied defendant's motion under subdivision (b)(6) of this rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

After foreclosure, where property was owned and possessed by independent third persons, it was impossible for plaintiffs to satisfy the requirement of reconveyance; this change in circumstances is a good example of a situation which would justify relief under subdivision (b)(6). Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

F. Void Judgments.

A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

A judgment is not void, etc. —

A judgment, if proper on its face, is not void. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

Time for Attacking Void Judgment, etc. —

In accord with the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Lack of In Personam Jurisdiction. — Judgment entered against defendant over which the court does not have in personam jurisdiction is void and subject to being set aside pursuant to subsection (b)(4) of this rule. Hayes v. Evergo Tel. Co., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

Motion Under Subsection (b)(4) Held Inappropriate. — Where the court had jurisdiction and authority to enter a contempt order, the order was not void, and therefore, a subsection (b)(4) motion was an inappropriate means to rectify the alleged error of failing to appoint counsel for defendant. Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990).

Rule 61. Harmless error.

CASE NOTES

Introduction of Erroneous Instruction. — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief because there was no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

The exclusion of memorandum as evidence was harmless error because plaintiff did not show that (1) it was prejudiced by the exclusion of the memorandum and (2) had the memorandum been admitted, a different result would likely have ensued. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, rev'd on other grounds, 342 N.C. 159, 463 S.E.2d 72 (1995).

Even though it is error to permit the jury to view exhibits in the jury room absent the parties' express consent, the complaining party is not entitled to a new trial absent a showing that the error was prejudicial. Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994); In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996).

Cited in Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997).

Rule 62. Stay of proceedings to enforce a judgment.

CASE NOTES

Construction with Other Sections. — Section 1-292 must be complied with notwithstanding defendant's appeal rights under this rule. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

Where defendant did not request the setting of a bond nor did he post a bond as required, the defendant made no attempt to comply with the requirements of § 1-292, thus he was not entitled to a stay of execution under this rule. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

Authority to Stay Enforcement of Judgment Under Subsection (g). — A trial court possesses the legal authority to stay its own orders pending appeal in cases involving the Public Records Act. Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997).

Cited in Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Rule 63. Disability of a judge.

CASE NOTES

Original Judge Need Not Have Become Incapacitated. — Trial court did not err in having their post-judgment motions ruled upon by another judge; this rule neither requires nor implies that before a different judge can rule on post-trial motions, the judge who heard the case must have become incapacitated. Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

I. In General.
II. Preliminary Injunctions.
III. Temporary Restraining Orders.
VI. Damages on Dissolution.

I. IN GENERAL.

Applied in Industrial Innovators, Inc. v. Myrick-White, Inc., 99 N.C. App. 42, 392 S.E.2d 425 (1990).

Quoted in Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Stated in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

II. PRELIMINARY INJUNCTIONS.

Notice and Hearing Required for Preliminary Injunction. — Where movant received no notice of injunction and was not given an opportunity to be heard before the order was entered, the court lacked personal jurisdiction over movant and the court's order was void. Helbein v. Southern Metals Co., 119 N.C. App. 431, 458 S.E.2d 518 (1995).

Verification of Complaint Not a Condition for Issuance. — Verification of a complaint is not a condition for issuance of a preliminary injunction under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

III. TEMPORARY RESTRAINING ORDERS.

Where defendants moved to vacate temporary restraining order thirty days after it was entered, but the order had already expired by operation of law 10 days after issuance, there was no temporary restraining order in existence to vacate or dissolve so that defendants could not recover damages in a dissolution order pursuant to subsection (e). Democratic Party v. Guilford County Bd. of Elections, 342 N.C. 856, 467 S.E.2d 681 (1996), rehearing denied, 343 N.C. 517, 471 S.E.2d 70 (1996).

Since temporary restraining order expired, by operation of law, after ten days, defendant bank had no legal authority to continue to freeze plaintiff's funds after the ten days had passed. Taylor v. Centura Bank, 124 N.C. App. 661, 478 S.E.2d 226 (1996).

VI. DAMAGES ON DISSOLUTION.

Unsworn Statement Not Sufficient Evidence of Damages. — Where the record indicated the trial court relied upon the unsworn statement of counsel that the Board of Education suffered "about seven fifty" in damages in making finding of fact, the statement by the attorney at trial was not considered evidence. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Meaning of "Judgment Finally Obtained". — The Court of Appeals erred in concluding the "judgment finally obtained" under this rule means the jury's verdict. The decision to equate "judgment finally obtained" with the jury's verdict ignores the plain meaning of the words chosen by the legislature and employed in this rule. Poole v. Miller, 342 N.C. 349, 464 S.E.2d 409 (1995).

Prevailing Parties. — Because the rational behind this rule is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Ambiguity of Phrase. — The phrase "together with costs accrued" was ambiguous as to whether the "costs accrued" were included in the amount offered pursuant to this rule or whether the costs were left to be separately determined by the court. Craighead v. Carrols Corp., 115 N.C. App. 381, 444 S.E.2d 651 (1994).

Interest and Other Costs Not Included. — Where the relevant portion of defendant's offer of judgment allowed judgment to be taken against them for "$10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued"; use of the language "together with" evidenced an intent to make an offer of judgment only as to the substantive claim and attorney fees, but not as to any other costs such as interest; therefore, construing the offer against defendants, as the drafters, a lump sum offer was not intended. Aikens v. Ludlum, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

Taxing of Costs on Nonspecific Offer. — Trial court did not have authority under this rule to tax costs to the plaintiff where defendants made a nonspecific offer for both plaintiffs to take judgment against defendants for a total sum of $25,000. When multiple plaintiffs in the same complaint have independent claims for relief, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff; a party wishing to accept the offer should not be barred from doing so, and thus subject himself to penalties under this rule, just because the other party would not accept. True v. T & W Textile Mach., Inc., 112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134, aff'd per curiam, 337 N.C. 798, 448 S.E.2d 514 (1994).

An offeree who does not accept an offer of judgment must bear those costs incurred from the date the offer of judgment was tendered only when the "judgment finally obtained" is not more favorable than the amount of the offer. Poole v. Miller, 342 N.C. 349, 464 S.E.2d 409 (1995).

Cited in Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

II. DECISIONS UNDER PRIOR LAW.

Quoted in Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Rule 68.1. Confession of judgment.

CASE NOTES

I. In General.

I. IN GENERAL.

Imposition of restitution as a condition of probation is not a legal obligation equivalent to a civil judgment; therefore, in sentences imposed for § 14-100 convictions, that part of the judgment purporting to require defendant to sign confessions of judgment was vacated. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Cited in Snipes v. Snipes, 118 N.C. App. 189, 454 S.E.2d 864 (1995).

Chapter 1B.

Contribution.

Article 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

Legal Periodicals. — For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of Lee v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For note, "The Release Provision of the Uniform Contribution Among Tort-Feasors Act Applies to Vicarious Liability in the Master-Servant Context — Yates v. New South Pizza, Ltd.," see 15 Campbell L. Rev. 55 (1992).

CASE NOTES

I. In General.

I. IN GENERAL.

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The right to contribution is statutory and is applicable only between joint tort-feasors. Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

No Right to Contribution from One Not a Joint Tort-Feasor. — There is no right to contribution from one who is not a joint tort-feasor. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

The right to contribution does not exist unless two or more parties are joint tort-feasors. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Nor for Claim on Contract. — Under subsection (a) of this section, a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable in tort. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Claim for relief, based on a breach of implied warranty, gave rise to no right of contribution on the part of third party plaintiff, because it sounded in contract and not in tort. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Contribution Not Available for Intentional Infliction of Mental Distress. — The language of subsection (c) of this section clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Who Are Joint Tort-Feasors. — Two or more parties are joint tort-feasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

If independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tort-feasors within the meaning of the law. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Suit Against One or More Joint Tort-Feasors by Personal Representative. — The personal representative of a person killed by the negligence of two joint tort-feasors may, at his election, sue one or both of the tort-feasors. If he sues both and the jury finds them to be joint tort-feasors, the resulting judgment is joint and several and the party paying more than his pro rata share of the judgment is entitled to contribution from the other. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Joinder of Other Tort-Feasors by Defendant. — Where plaintiff elects to sue only one of several joint tort-feasors, the original defendant may have others joined as additional or third party defendants. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Separate Action by Defendant Against Other Tort-Feasor. — Where one of two joint tort-feasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tort-feasor. In such a case he must establish, not only that a judgment has been entered against him, but that the other party is in fact a joint tort-feasor, that is, that the other party is liable jointly with the original defendant to the plaintiff for damages. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

The burden is on the tort-feasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

To permit an original defendant against whom a judgment is entered in a claim for the wrongful death of a child to collect one-half of the judgment from the parent, based solely on determination of parent's negligence for the purpose of assessing damages against defendant, would effectively remove any need to make the parent a third party defendant. The practical effect of such a holding would be to prevent the parent's insurer from having an opportunity to defend a claim against the parent. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Third-party plaintiff had an affirmative burden to show that he met the requirements of subsection (d) of this section, and he failed to meet this burden where he did not introduce evidence of a release that he claimed he obtained from the injured party, nor show that third-party defendant's liability to the injured party had been extinguished. King v. Humphrey, 88 N.C. App. 143, 362 S.E.2d 614 (1987).

Trial court erred in not applying § 1B-4 where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only a single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Church was not entitled to contribution from the YMCA where the church paid nothing of its own in settlement; therefore, it did not pay more than its pro rata share and was not entitled to contribution. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

Although it appears that the legislature intended the phrase in subsection (f) of this section to mean "where one tort-feasor is entitled to indemnity from another tort-feasor," the language of the statute is simply "where one tort-feasor is entitled to indemnity from another." Since the term "another" as used in the statute is ambiguous, by applying principles of statutory construction to ascertain the legislative will, and the title of the Act makes clear that the statute applies to "tort-feasors"; the context of the legislation indicates that it is concerned only with the apportionment of loss as between tort-feasors, and the Act should not be read to speak to apportionment of loss by contract between a tort-feasor and a third party. Yates v. New S. Pizza, Ltd., 102 N.C. App. 66, 401 S.E.2d 380 (1991), rev'd on other grounds, 330 N.C. 790, 412 S.E.2d 666, reh'g denied, 331 N.C. 292, 417 S.E.2d 73 (1992).

Underinsured insurance carrier cannot assert a claim of contribution because the carrier is not a tortfeasor; however, the carrier can bring a direct action against one of the defendants even though that defendant executed a release in favor of the other defendants. Johnson v. Hudson, 122 N.C. App. 188, 468 S.E.2d 64 (1996).

Applied in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); Yates v. New S. Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992).

Quoted in Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988).

Cited in Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Broussad v. Meineke Discount Muffler Shops, Inc., W.D.N.C., 958 F. Supp 1087 (1997).

§ 1B-3. Enforcement.

CASE NOTES

Subsection (e) codifies the common-law rule applicable to joint tort-feasors. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Party Entitled to One Satisfaction. — Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Statute of Limitations. — Subdivision (d)(3) must be read to provide for a three-year statute of limitations for refiling contribution claims. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

The legislature has failed to fix a time in subdivision (d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Claims Between Insurance Companies. — Claim for contribution by insurance company against another insurance company was sufficiently analogous to claim for subrogation to warrant application of three year statute of limitations of § 1-52(1); this section, which applies to actions among joint tortfeasors, did not apply to claims between insurance companies who both provide coverage to the same tortfeasor. Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 122 N.C. App. 449, 470 S.E.2d 556 (1996).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Section 1B-4 Not Applicable Where Requirements of Subsection (e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

§ 1B-4. Release or covenant not to sue.

CASE NOTES

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Section Not Applicable Where Requirements of § 1B-3(e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

This section permits a tort-feasor to enter into a good faith settlement and release with an injured party and relieve himself of further liability to remaining joint tort-feasors for contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

One Recovery for Each Injury. — North Carolina recognizes the common law principle of "one recovery" for each injury, even where the legislature has authorized damages that are punitive in character. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

Trial court erred in not applying this section where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

A defendant who settles with a plaintiff and invokes this section to bar a cross claim for contribution from a co-defendant does not lose his rights to pursue his own cross claim or counterclaim against the same co-defendant for damages (personal and property) allegedly inflicted upon him by the co-defendant. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

Reduction of a claim because of a settlement with one defendant is not limited to cases where the defendant is a joint tortfeasor, but applies to all cases where a plaintiff is seeking recovery from several defendants for single, indivisible injury. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996).

Claims for Injury or Damage Not Addressed. — The plain language of this section does not address cross claims or counterclaims for personal injury or property damage; this section only addresses the statutory right to contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.

CASE NOTES

Equitable Contribution. — Nothing on the face of this section, or in its history, indicates that the General Assembly intended to eliminate the right to seek equitable contribution. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute for preserving the judgment. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

Cited in Broussad v. Meineke Discount Muffler Shops, Inc., W.D.N.C., 958 F. Supp 1087 (1997).

Chapter 1C.

Enforcement of Judgments.

Article 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

CASE NOTES

Construction of Section. — Since the primary purpose of a bond is to provide a source of funds to be applied to the satisfaction of a valid judgment, as a matter of public policy, a party is not permitted to post a cash bond to stay execution of a money judgment and then avoid forfeiture of the bond after default by claiming debtor's exemptions. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

North Carolina, by this section, etc. — North Carolina has opted-out of the § 522(d) exemptions of the Bankruptcy Code and has instead created its own. In re McQueen, 196 Bankr. 31 (E.D.N.C. 1995).

When husband elected to deposit cash bond in lieu of surety bond to stay execution of a judgment against him for spousal support and breach of separation agreement, husband waived any exemption to which he otherwise may have been entitled. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

§ 1C-1603. Procedure for setting aside exempt property.

CASE NOTES

Authority of District Court. — Although no specific statute grants a district court authority, when a matter relating to exemptions is transferred, pursuant to subsection (e)(7), from the clerk to the district court, the district court must be given the same general authority granted to a superior court pursuant to § 1-276. Bromhal v. Stott, 119 N.C. App. 428, 458 S.E.2d 724 (1995).

Jurisdiction of District Court. — Once the issue of exemptions is properly before the district court, that court has jurisdiction to order the sale of exempt property having excess value, unless it would be more efficient to remand this issue to the clerk. Bromhal v. Stott, 119 N.C. App. 428, 458 S.E.2d 724 (1995).

Where debtors' interest in two adjacent lots exceeded the amount of the available exemption debtors could not protect their entire interest in both lots; because they exhibited no intention to protect one lot at the expense of losing the lot on which their house rested and, without sacrificing the lot with their home, could not have exempted the other lot from sale, they had no standing to challenge the sale of the other lot. Hollar v. United States, 188 Bankr. 539 (M.D.N.C. 1995), aff'd without op. 92 F.3d 1179 (4th Cir. 1996).

§ 1C-1604. Effect of exemption.

CASE NOTES

Ownership Interest Required. — Under North Carolina law, an individual must have an ownership interest in residential property in order to claim a homestead exemption in the property. Hollar v. United States, 184 Bankr. 25 (Bankr. M.D.N.C.), aff'd, 188 Bankr. 539 (M.D.N.C. 1995), aff'd, 92 F.3d 1179 (4th Cir. 1996).

Chapter 1D.

Editor's Note. — The legislation and annotations affecting Chapter 1D have been included in a recently published replacement chapter.

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

Legal Periodicals. —

For article discussing the influence, past and future, of civil law on common law jurisdictions, see 1990 Duke L.J. 1207.

For note, "Its Days were Numbered: The Year and a Day Rule Falls in North Carolina — State v. Vance," see 14 Campbell L. Rev. 235 (1992).

CASE NOTES

I. General Consideration.
II. Illustrative Cases.
  A. Civil.
  B. Criminal.

I. GENERAL CONSIDERATION.

Historical Background. —

Since the American Revolution and our independence, the common law has continued to apply in North Carolina. Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988).

Extent of Common Law in Force and Effect. —

The "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

Effect of Legislation with Respect to Subject Matter of Common-Law Rule. —

When the General Assembly legislates in respect to the subject matter of a common law rule, the statute supplants the common law rule in regard to that matter. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

Applied in State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Quoted in State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996).

Cited in State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Hatcher v. Rose, 329 N.C. 626, 407 S.E.2d 172 (1991); State v. Lane, 115 N.C. App. 25, 444 S.E.2d 233 (1994).

II. ILLUSTRATIVE CASES.

A. Civil.

Because the historical purposes underlying the separation exception to the necessaries doctrine are incompatible with current mores and laws governing modern marital relationships in North Carolina, the separation exception as previously applied in the courts is "obsolete" within the meaning of this section. Being obsolete, that exception has no place in the common law and must be modified. Forsyth Mem. Hosp. v. Chisholm, 342 N.C. 616, 467 S.E.2d 88 (1996).

The determination of the navigability of waters by whether they were subject to the ebb and flow of the tides, the lunar tides test, had never been part of the English common law applied in this State before or after the Revolution and that test was "obsolete," as it was inapplicable to the conditions of the waters within this State. For these reasons, the lunar tides test is not a part of the common law as it applies in North Carolina. Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

B. Criminal.

The year and a day rule has become "obsolete," within the meaning of that term as used in this section, and is no longer part of the common law of North Carolina for any purpose. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.
5A-11. Criminal contempt.
5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

Sec.
5A-15. Plenary proceedings for contempt.

Article 2.

Civil Contempt.

5A-22. Release when civil contempt no longer continues.
5A-23. Proceedings for civil contempt.

Article 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1.)

Editor's Note. — Session Laws 1994, Extra Session, c. 19, s. 1, which amended this section, was effective May 1, 1994, and applicable to defendants sentenced on or after that date.

Legal Periodicals. — For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

- I. General Consideration.
- IV. Acts Constituting Contempt.
  - A. In General.
  - B. Disruptive Conduct.
  - C. Disobedience of Orders.

I. GENERAL CONSIDERATION.

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file consent order would result in the imposition of sanctions. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Failure to Comply with Schedules. — The trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Applied in Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Stated in In re Nakell, 104 N.C. App. 638, 411 S.E.2d 159 (1991).

Cited in State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

In order for an act to be "willful," as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

"Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Willfulness or Gross Negligence Not Shown. — Where evidence showed that defendant's short delay of an hour or an hour and a quarter in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone, defendant's behavior did not rise to the level of willfulness or gross negligence. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

B. Disruptive Conduct.

Employment of Individual to Disrupt Criminal Trial. — Evidence held sufficient to support the trial judge's finding that respondent attorney solicited an individual to disrupt the criminal trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of subsection (a) of this section. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

C. Disobedience of Orders.

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

In the absence of an order to be present, defendant may not be held in contempt for violation of such an order. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Violations of Court's Holding Regarding Standing. — Where court repeatedly held that former corporation manager had no standing to appeal, but he continued to appeal every decision reached on behalf of corporate defendants in violation of court's orders, trial court had jurisdiction to consider criminal contempt based on corporation manager's repeated violations of the court's orders. Lowder v. All Star Mills, Inc., 100 N.C. App. 318, 396 S.E.2d 92 (1990).

Because an administrative agency of the State is not subject to contempt, respondent, a State employee who was dismissed from his job and later reinstated, could not petition the superior court for a show cause order against petitioner Department of Transportation ("DOT"), an administrative agency of the State, for contempt pursuant to this section or § 5A-21. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed 6 months, fine not to exceed five hundred dollars ($500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or

(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article may nevertheless, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt. If a person is found in both civil contempt and criminal contempt for the same conduct, the total period of imprisonment is limited as provided in G.S. 5A-21(c).

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3; 1985 (Reg. Sess., 1986), c. 843, s. 1; 1987 (Reg. Sess., 1988), c. 1040, s. 2.)

Editor's Note. —

Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 1, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, extended the expiration date of Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, as noted in the main volume, from October 1, 1988, to October 1, 1993. However, Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 2 amended subsection (a) of this section to read as it did prior to amendment by Session Laws 1985 (Reg. Sess., 1986), c. 843.

CASE NOTES

Punishment for Criminal and Civil Contempt, etc. —

A major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Contempt may be of two kinds, civil or criminal, although the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Provision in a criminal contempt adjudication requiring defendant to pay $3,150 in damages to plaintiff was invalid, because this section limits the punishment that can be imposed for criminal contempts to a fine of $500 and 30 days in jail; and damages may not be awarded to a private party because of any contempt, which is an offense against the State. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-

1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Where the judge converted an entry into a final judgment, the violation of which subjected the defendant to criminal contempt of court, punishable under subsection (a), the trial court erred when it imposed a term of imprisonment of six months, suspended for five years under the supervision of a probation officer; therefore, the case was remanded for a hearing on contempt pursuant to § 5A-11(a)(3). State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

Quoted in Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Cited in North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

CASE NOTES

Indirect Contempt. — Indirect contempt is that which arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Defendant's failure to appear at a show cause hearing was classified as indirect criminal contempt since trial judge had no direct knowledge of facts which would establish that defendant's failure to appear was willful. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

Requirements of Due Process. — The requirements of due process are met when one charged with contempt is afforded notice and an opportunity to be heard; delayed summary contempt proceedings are also consistent with due process. Nakell v. Attorney Gen., 15 F.3d 319 (4th Cir.), cert. denied, 513 U.S. 866, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

§ 5A-14. Summary proceedings for contempt.

CASE NOTES

Cited in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 44.)

CASE NOTES

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Applied in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Cited in State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987); Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990); Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

§ 5A-17. Appeals.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Jurisdiction. —

Criminal contempt orders are properly appealed from district court to the superior court, not to the Court of Appeals. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Quoted in State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

Cited in Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990); Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990); Jones v. Jones, 121 N.C. App. 529, 466 S.E.2d 344 (1996).

ARTICLE 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

Legal Periodicals. —

For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

- I. General Consideration.
- II. Orders Enforceable as Civil Contempt.
- III. Purging Contempt.
- IV. Practice and Procedure.
- V. Appeal and Error.

I. GENERAL CONSIDERATION.

An administrative agency of the State is not subject to contempt. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

Treatment of Civil Contempt. —

Trial court was in error where it described a civil contempt action as punishment. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Civil contempt order was not proper where the court order allegedly violated was not directed at defendant. Atassi v. Atassi, 122 N.C. App. 356, 470 S.E.2d 59 (1996).

Disobedience Must Be Willful. —

In accord with second paragraph in the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Thus, Defendant Must Possess Means, etc. —

The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Conduct Held Willful. — Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Findings on Means to Comply Held Adequate. — Trial court's finding regarding contemnor's "present means to comply" held minimally sufficient to satisfy the statutory requirement for civil contempt, although specific findings supporting the contemnor's present means are preferable. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

No Authority to Award Costs to Private Party in Contempt Proceeding. — A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18 (when costs shall be allowed to plaintiff as a matter of course) or § 6-20 (allowance of costs in discretion of court) would apply. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Court Not Authorized to Award Attorneys' Fees. — In a contempt action for the enforcement of a consent judgment regarding defendant's obligation to pay daughter's college tuition, the trial court was without authority to award the plaintiff attorneys' fees. Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991).

Consent Judgment Not Enforceable Through Contempt Powers. — Where the judgment on which the trial court based its contempt order did not reflect a determination by the trial court of either issues of fact or conclusions of law presented by the case before it, the order was merely a recital of the parties' agreement and not an adjudication of rights. Consequently, the consent judgment was not an order enforceable through the contempt powers of the court. Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Visitation Orders. — Where mother encouraged child to go with his father for scheduled visitations, and the child refused, the evidence was insufficient to find that the mother acted purposefully and deliberately or with knowledge and stubborn resistance to prevent the father's visitation with the child, so as to subject her to civil contempt; the mother was not required to physically force the child to go. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Payment of Educational Expenses. — Where defendant refused to pay educational expenses as provided in consent judgment, there was competent evidence to support the court's findings and conclusion that the defendant was in contempt of the consent judgment pursuant to subsection (a). Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

III. PURGING CONTEMPT.

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

IV. PRACTICE AND PROCEDURE.

Where the trial court made no findings of defendant's ability to pay the entire arrearage arising from nonpayment of child support, the Court of Appeals was required to conclude that there were inadequate findings to support the adjudication of civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

V. APPEAL AND ERROR.

Scope of Review. —
In accord with the main volume. See Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 45.)

CASE NOTES

Means for Purging Contempt Required. — Trial court had the authority to enforce consent order regarding repairs to a dwelling through its contempt powers, but the trial court erred by failing to provide for a means for defendant to purge himself of the contempt. Nohejl v. First Homes of Craven County, Inc., 120 N.C. App. 188, 461 S.E.2d 10 (1995).

Trial Court Without Authority to Require Contemnor to Pay Compensatory Damages. — Upon a finding of contempt, in situations where the original order requires a transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order the contemnor to transfer said property as a condition of purging the contempt, but does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Cited in Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986).

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor. If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46.)

CASE NOTES

Defendant's Rights Under U.S. Const., Amend. V Not Implicated in Civil Contempt Case. — Where trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with prior consent order and paying certain sums for attorney's fees and damages, and imposed no other penalty, the relief granted was wholly civil in nature. Since defendant was not, in fact, subject to criminal penalties, there was no necessity to examine whether defendant's rights under U.S. Const., Amend. V were adequately protected during the contempt proceeding. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Contemnor Must Have Means to Comply Before Being Found in Contempt. —

On its face order demonstrated noncompliance with this section where the trial court first determined that plaintiff's failure to appear created the jeopardy of contempt, then it immediately found plaintiff to be in actual contempt. Garrett v. Garrett, 121 N.C. App. 192, 464 S.E.2d 716 (1995).

Judge was authorized to shorten notice period of civil contempt hearing for good cause, where the defendant had known for several months of the particular charges pending against him and had had ample opportunity to prepare to meet them, where all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties, and where defendant's lawyer acknowledged that his argument for delaying the hearing was based, not upon any unreadiness to proceed, but upon his mistaken impression that a hearing upon less than five days notice was automatically invalid. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Notice. — Arrest order was improper where it was issued without assurance that the party had received notice and opportunity to be heard as required by this section. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Defendant Held Not Entitled to Notice. — Where the defendant had notice of civil contempt hearing and he was simultaneously adjudged to be in both civil and criminal contempt, defendant was entitled to no notice as to the criminal contempt, as subsection (g) of this section expressly authorizes a judge conducting a hearing to determine civil contempt to "find the person in criminal contempt for the same conduct" upon making the required findings. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Cited in Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996).

§ 5A-24. Appeals.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Nature of Order. — Where order allowed mother to purge the contempt by delivering the child over to the father for his scheduled visitation and by turning over the father's property or otherwise consenting to a search of her home, the contempt order was actually civil in nature. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

In civil contempt matters, appeal is from the district court to the Court of Appeals. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996).

Quoted in State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

Cited in Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996).

Chapter 6.

Editor's Note. — The legislation and annotations affecting Chapter 6 have been included in a recently published replacement chapter.

Chapter 7A.

Judicial Department.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 3.

The Supreme Court.

Sec.
7A-10. Organization; compensation of justices.

Article 5.

Jurisdiction.

7A-29. Appeals of right from certain administrative agencies.
7A-38.4. Mediated settlement conferences in district court actions.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7.

Organization.

7A-41. Superior court divisions and districts; judges.
7A-41.2. (See editor's note) Nomination and election of regular superior court judges.
7A-42. Sessions of superior court in cities other than county seats.
7A-45.1. Special judges.

Article 9.

District Attorneys and Judicial Districts.

7A-60. District attorneys and prosecutorial districts.
7A-69. Investigatorial assistants.

Article 12.

Clerk of Superior Court.

7A-101. Compensation.
7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.
7A-109. Record-keeping procedures.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 13.

Creation and Organization of the District Court Division.

Sec.
7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Article 16.

Magistrates.

7A-171.1. Duty hours, salary, and travel expenses within county.

Article 18.

District Court Practice and Procedure Generally.

7A-191.1. Recording of proceeding in which defendant pleads guilty or no contest to felony in district court.
7A-198. Reporting of civil trials.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.

Article 24.

Juvenile Services.

7A-289.2. Definitions.

Article 24A.

Delinquency Prevention and Youth Services.

7A-289.13. Legislative intent.
7A-289.14. Duties of Secretary of Health and Human Services.

Sec.
7A-289.15. Purchase of care or services from programs meeting State standards.
7A-289.16. County assessment of youth needs.

Article 24B.

Termination of Parental Rights.

7A-289.24. Who may petition.
7A-289.32. Grounds for terminating parental rights.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

7A-304. Costs in criminal actions.
7A-307. Costs in administration of estates.
7A-308. Miscellaneous fees and commissions.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

7A-343.1. Distribution of copies of the appellate division reports.
7A-347. Assistants for administrative and victim and witness services.
7A-348. Training and supervision of assistants for administrative and victim and witness services.

Article 30.

Judicial Standards Commission.

7A-375. Judicial Standards Commission.
7A-377. Procedures; employment of executive secretary, special counsel or investigator.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-450.4. Exemptions.
7A-451. Scope of entitlement.

Article 37.

The Public Defender.

Sec.
7A-465. Public defender; defender districts; qualifications; compensation.
7A-466. Term of defender; selection; removal.

Article 37A.

Access to Civil Justice Act.

7A-474.3. Eligible activities and limitations.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40A.

North Carolina Courts Commission.

7A-506. Creation; members; terms; qualifications; vacancies.
7A-507. Ex officio members.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

Article 41.

Purpose; Definitions.

7A-517. Definitions.

Article 42.

Jurisdiction.

7A-523. Jurisdiction.
7A-524. Retention of jurisdiction.

Article 44.

Screening of Abuse and Neglect Complaints.

7A-542. Protective services.
7A-543. Duty to report child abuse, neglect, dependency, or death due to maltreatment.
7A-544. Investigation by Director; access to confidential information; notification of person making the report.
7A-548. Duty of Director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Health and Human Services and State Bureau of Investigation.
7A-552. Central registry.

Article 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

Sec.
7A-571. Taking a juvenile into temporary custody.
7A-576. Place of secure or nonsecure custody.
7A-577. Hearing to determine need for continued secure or nonsecure custody.

Article 47.

Basic Rights.

7A-585. Appointment of guardian.

Article 48.

Law-Enforcement Procedures in Delinquency Proceedings.

7A-598. Grounds for order.
7A-600. Nontestimonial identification order at request of juvenile.
7A-603. Fingerprinting and photographing delinquent juveniles.
7A-604 through 7A-607. [Reserved.]

Article 52.

Dispositions.

7A-646. Purpose.
7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.
7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.
7A-651. Dispositional order.
7A-652. Commitment of delinquent juvenile to Division of Youth Services.

Sec.
7A-653. Transfer authority of Governor.
7A-655. Conditional release and final discharge.
7A-657. Review of custody order.

Article 54.

Juvenile Records and Social Reports.

7A-675. Confidentiality of records.
7A-675.1. Disclosure in child fatality or near fatality cases.
7A-675.2. Notification of schools when juveniles are alleged or found to be delinquent.
7A-675.3. Juvenile recidivism rates.
7A-676. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

Article 60.

Office of Administrative Hearings.

7A-751. Agency head; powers and duties; salaries of Chief Administrative Law Judge and other administrative law judges.
7A-759. (Effective until December 31, 1998) Role as deferral agency.

SUBCHAPTER XIII. COMMUNITY PENALTIES PROGRAM.

Article 61.

Community Penalties Program Act of 1983.

7A-771. Definitions.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 3.

The Supreme Court.

§ 7A-10. Organization; compensation of justices.

(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Except as otherwise provided in this subsection, sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business. The court may by rule hold sessions not more than twice annually in the Old Chowan County Courthouse (1767) in the Town of Edenton, which is a State-owned court facility that is designated as a National Historic Landmark by the United States Department of the Interior.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in Current Operations Appropriations Act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(c) In lieu of merit and other increment raises paid to regular State employees, the Chief Justice and each of the Associate Justices shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission. Service shall also mean service as a district attorney or as a clerk of superior court. (1967, c. 108, s. 1; 1983, c. 761, s. 242; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1; 1985, c. 698, s. 10(a); 1997-56, s. 1.)

Effect of Amendments. — The 1997 amendment, effective May 16, 1997, in subsection (a), at the beginning of the fourth sentence added "Except as otherwise provided in this subsection", and added the last sentence.

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

I. General Consideration.
IV. Interlocutory Orders.
  A. Generally.
  B. Particular Orders.

I. GENERAL CONSIDERATION.

Applied in Johnson v. Hudson, 122 N.C. App. 188, 468 S.E.2d 64 (1996); In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

Quoted in State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996).

Cited in State v. Worthy, 341 N.C. 707, 462 S.E.2d 482 (1995); State v. Butler, 341 N.C. 686, 462 S.E.2d 485 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. Pleasant, 342 N.C. 366, 464 S.E.2d 284 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Straing, 342 N.C. 623, 466 S.E.2d 278 (1996); Willoughby v. Board of Trustees, 121 N.C. App. 444, 466

S.E.2d 285 (1996); State v. Jones, 342 N.C. 628, 467 S.E.2d 233 (1996); State v. Williams, 342 N.C. 869, 467 S.E.2d 392 (1996); State v. Brewton, 342 N.C. 875, 467 S.E.2d 395 (1996); State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996); State v. Murphy, 342 N.C. 813, 467 S.E.2d 428 (1996); State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996); State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996); State v. Kilpatrick, 343 N.C. 466, 471 S.E.2d 624 (1996); State v. Burrus, 344 N.C. 79, 472 S.E.2d 867 (1996); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996); State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996); State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (1996); State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996); State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996); State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996); State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (1996); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Armstrong, 345 N.C. 161, 478 S.E.2d 194 (1996); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996); State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (1997); State v. Anderson, 346 N.C. 158, 484 S.E.2d 543 (1997); State v. Evans, 346 N.C. 221, 485 S.E.2d 271 (1997); State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (1997); State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997); Bellsouth Telecommunications, Inc. v. North Carolina Dep't of Revenue, — N.C. App. —, 485 S.E.2d 333 (1997); United Servs. Auto. Ass'n v. Simpson, — N.C. App. —, 485 S.E.2d 337 (1997).

IV. INTERLOCUTORY ORDERS.

A. Generally.

When Interlocutory Order Is Appealable Generally. —

An appeal of an interlocutory order or judgment is permitted if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. North Carolina DOT v. Page, 119 N.C. App. 730, 460 S.E.2d 332 (1995).

There are two avenues by which an interlocutory judgment or order can be immediately appealed. First, if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal, and second, an interlocutory order can be immediately appealed under § 1-277(a) and subdivision (d)(1) of this section if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996).

There are two avenues by which a party may immediately appeal an interlocutory order of judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to § 1A-1-54(b) an immediate appeal may lie. Second, an appeal is permitted under subdivision (d)(1) of this section and § 1-277 (a) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tinch v. Video Indus. Servs., Inc., 124 N.C. App. 391, 477 S.E.2d 193 (1996).

A party has a "substantial right" to avoid separate trials, etc. —

The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims. Allen v. Sea Gate Ass'n, 119 N.C. App. 761, 460 S.E.2d 197 (1995).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, — N.C. App. —, 484 S.E.2d 98 (1997).

B. Particular Orders.

Summary Judgment Based on Governmental Immunity. — Generally, denial of a motion for summary judgment is interlocutory and not immediately appealable; however, if the defense of governmental immunity is asserted as grounds for the summary judgment motion, the denial of the motion has been held to affect a substantial right, and the order is immediately appealable pursuant to § 1-277(a) and subsection (d). Hallman v. Charlotte-Mecklenburg Bd. of Educ., 124 N.C. App. 435, 477 S.E.2d 179 (1996).

Order Granting Summary Judgment. —

Since plaintiff's claim for negligent infliction of emotional distress, on which defendant was granted summary judgment, involved the issue of defendant's negligence as well as the separate factual issues of the existence of severe emotional distress and foreseeability of injury, if at trial a jury determined defendant's conduct to have been negligent, then plaintiff would only have to prove severe emotional distress and foreseeability of injury at a second trial in the event of a proper successful appeal of the summary judgment. Since a second trial would not require plaintiff to retry the negligence issue, there were no overlapping issues to justify an immediate appeal of the interlocutory order. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

Order Granting Partial Summary Judgment. —

There were no factual issues common to the claims determined by summary judgments or the claims remaining, so that no substantial right was affected and plaintiff was not entitled to interlocutory appeal of summary judgments, since plaintiff did not present identical factual issues creating the possibility of two trials on the same issue. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

Discovery Orders. —

There was no right to appeal where a discovery order contained no enforcement sanctions, did not finally determine the action, nor did it affect a substantial right which might "be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." Kaplan v. Prolife Action League, 123 N.C. App. 677, 474 S.E.2d 408 (1996).

Order Denying Motion for Stay. — The denial of defendant's motion for stay did not dispose of any of the claims or parties, the trial court did not certify the case for immediate appeal under § 1A-1, Rule 54(b), and defendants did not show that the trial court's decision deprived them of a substantial right which would be lost absent immediate review. Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996).

Appeal Regarding Waiver of Parental Consent. — No appeal of right lies to the Court of Appeals from an order of the superior court entered pursuant to § 90-21.8(h); the exclusive appeal remedy is the appeal from the district court to the superior court. In re Doe, — N.C. App. —, 485 S.E.2d 354 (1997).

§ 7A-29. Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) of this section, the Department of Health and Human Services under G.S. 131E-188(b), the Commissioner of Banks under Articles 17, 18, 18A, and 21 of Chapter 53 of the General Statutes, the Administrator of Savings and Loans under Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar under G.S. 84-28, the Property Tax Commission under G.S. 105-290 and G.S. 105-342, the Commissioner of Insurance under G.S. 58-2-80, or the Secretary of Environment and Natural Resources under G.S. 104E-6.2 or G.S. 130A-293, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2; 1991, c. 546, s. 2; c. 679, s. 2; 1993, c. 501, s. 2; 1995, c. 115, s. 1; c. 504, s. 2; c. 509, s. 2; 1997-443, ss. 11A.118(a), 11A.119(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-443, s. 11A.119(a), effective August 28, 1997, substituted "Environment and Natural Resources" for "Environment, Health, and Natural Resources."

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

No appeal lies from an interlocutory order, etc. — Only from a final order or decision of the Industrial Commission is there an appeal of right to the Court of Appeals. Ledford v. Asheville Hous. Auth., 125 N.C. App. 597, 482 S.E.2d 544 (1997).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219 (1995); Walton v. City of Raleigh, 342 N.C. 879, 467 S.E.2d 410 (1996); Democratic Party v. Guilford County Bd. of Elections, 342 N.C. 856, 467 S.E.2d 681 (1996); State v. Odum, 343 N.C. 116, 468 S.E.2d 245 (1996); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996); State ex rel. Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996); Roberts v. Madison County Realtors Ass'n, 344 N.C. 394, 474 S.E.2d 783 (1996); Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501 (1996); Moore v. City of Creedmoor, 345 N.C. 356, 481 S.E.2d 14 (1997); Cicogna v. Holder, 345 N.C. 488, 480 S.E.2d 636 (1997); State v. Davidson, 345 N.C. 496, 480 S.E.2d 701 (1997); State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997); Messer v. Town of Chapel Hill, 346 N.C. 259, 485 S.E.2d 269 (1997); In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997); Onslow County v. Phillips, 346 N.C. 265, 485 S.E.2d 618 (1997).

§ 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

Cited in State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995); State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996); Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996); Collins v. North Carolina Parole Comm'n, 344 N.C. 179, 473 S.E.2d 1 (1996); State v. Barnes, 345 N.C. 146, 478 S.E.2d 188 (1996); Tise v. Yates Constr. Co., 345 N.C. 456, 480 S.E.2d 677 (1997); State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

Applied in In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

Legal Periodicals. — For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

§ 7A-38.3. Prelitigation mediation of farm nuisance disputes.

Legal Periodicals. — For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

§ 7A-38.4. Mediated settlement conferences in district court actions.

(a) The purpose of this section is to authorize the design, implementation, and evaluation of a pilot program in which parties to district court actions involving equitable distribution, alimony, and support may be required to attend a pretrial mediated settlement conference or other settlement procedure.

(b) The Dispute Resolution Commission established under the Judicial Department shall, with the advice of the Director of the Administrative Office of the Courts, design the pilot program and its coordination with existing settlement programs. The planning and design phase of the program shall include representatives from the Conference of Chief District Court Judges, the AOC Child Custody Mediation Advisory Committee, the Court Ordered Arbitration Subcommittee of the Supreme Court's Dispute Resolution Committee, the North Carolina Mediation Network, the North Carolina Association of Professional Family Mediators, the North Carolina Association of Clerks of Superior Court, the North Carolina Association of Trial Court Administrators, the Family Law Section of the North Carolina Bar Association, and the Dispute Resolution Section of the North Carolina Bar Association.

(c) The Supreme Court may adopt rules to implement this section. The definitions in G.S. 7A-38.1(b) (2) and (b) (3) apply to this section.

(d) The chief district court judge of any participating district may order a mediated settlement conference for any action pending in the district involving issues of equitable distribution, alimony, or child or spousal support. The chief district court judge may by local rule order all such cases, not otherwise exempted by Supreme Court rule, to mediated settlement conference.

(e) The parties to a district court action in which a mediated settlement conference is ordered, their attorneys, and other persons or entities with authority, by law or by contract, to settle the parties“ claims shall attend the mediated settlement conference, or other settlement procedure ordered by the court, unless excused by the rules of the Supreme Court or by order of the chief district court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(f) Any person required to attend a mediated settlement conference or other settlement procedure ordered by the court who, without good cause, fails to attend in compliance with this section and the rules adopted under this section, shall be subject to any appropriate monetary sanction imposed by a chief or presiding district court judge, including the payment of attorneys“ fees, mediator fees, and expenses incurred in attending the conference. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(g) The parties to a district court action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules of the Supreme Court, a mediator shall be appointed by the chief district court judge or its designee.

(h) The chief district court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by local district court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with the rules or pursuant to agreement of the parties. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law.

(i) Mediators and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(j) Costs of mediated settlement conferences and other settlement procedures shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator’s fees shall be paid in equal shares by the parties. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of settlement procedures are afforded an opportunity to participate without cost to an indigent party and without expenditure of State funds.

(k) Evidence of statements made and conduct occurring in a mediated settlement conference shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference.

No mediator, or other neutral conducting a settlement procedure pursuant to this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(*l*) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in the mediated settlement conference program established pursuant to this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission. An administrative fee not to exceed two hundred dollars ($200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operation under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff.

(m) Nothing in this section or rules adopted pursuant to it shall restrict the right to jury trial. (1997-229, s. 1.)

Editor's Note. — Session Laws 1997-229, s. 2, provides that the Administrative Office of the Courts may solicit and accept funds from private sources to design and develop programs authorized under that act, and shall report to the Chairs of the House and Senate Appropriations Committees and the House and Senate Appropriations Subcommittees on Justice and Public Safety by May 1, 1998.

Session Laws 1997-229, s. 3, made this section effective June 27, 1997.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges.

(a) The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
	3A	Pitt	2
	3B	Carteret, Craven, Pamlico	2
	4A	Duplin, Jones, Sampson	1
	4B	Onslow	1
	5	New Hanover, Pender	3
	6A	Halifax	1
	6B	Bertie, Hertford, Northampton	1
	7A	Nash	1
	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
	8A	Lenoir and Greene	1
	8B	Wayne	1
Second	9	Franklin, Granville, Vance, Warren	2
	9A	Person, Caswell	1
	10A	(part of Wake, see subsection (b))	2
	10B	(part of Wake, see subsection (b))	2
	10C	(part of Wake, see subsection (b))	1
	10D	(part of Wake, see subsection (b))	1
	11A	Harnett, Lee	1
	11B	Johnston	1
	12A	(part of Cumberland, see subsection (b))	1
	12B	(part of Cumberland, see subsection (b))	1
	12C	(part of Cumberland,	2

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		see subsection (b))	
	13	Bladen, Brunswick, Columbus	2
	14A	(part of Durham, see subsection (b))	1
	14B	(part of Durham, see subsection (b))	3
	15A	Alamance	2
	15B	Orange, Chatham	1
	16A	Scotland, Hoke	1
	16B	Robeson	2
Third	17A	Rockingham	2
	17B	Stokes, Surry	2
	18A	(part of Guilford, see subsection (b))	1
	18B	(part of Guilford, see subsection (b))	1
	18C	(part of Guilford, see subsection (b))	1
	18D	(part of Guilford, see subsection (b))	1
	18E	(part of Guilford, see subsection (b))	1
	19A	Cabarrus	1
	19B	Montgomery, Moore, Randolph	2
	19C	Rowan	1
	20A	Anson, Richmond	1
	20B	Stanly, Union	2
	21A	(part of Forsyth, see subsection (b))	1
	21B	(part of Forsyth, see subsection (b))	1
	21C	(part of Forsyth, see subsection (b))	1
	21D	(part of Forsyth, see subsection (b))	1
	22	Alexander, Davidson, Davie, Iredell	2
	23	Alleghany, Ashe, Wilkes, Yadkin	1
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1
	25A	Burke, Caldwell	2
	25B	Catawba	2

Judicial Division	Superior Court District	Counties	No. of Resident Judges
	26A	(part of Mecklenburg, see subsection (b))	2
	26B	(part of Mecklenburg, see subsection (b))	2
	26C	(part of Mecklenburg, see subsection (b))	2
	27A	Gaston	2
	27B	Cleveland, Lincoln	2
	28	Buncombe	2
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	2
	30A	Cherokee, Clay, Graham, Macon, Swain	1
	30B	Haywood, Jackson	1

(b) For superior court districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

(1) Superior Court District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.

(2) Superior Court District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.

(3) Superior Court District 10A consists of Raleigh Precincts 12, 13, 14, 18, 19, 20, 22, 25, 26, 28, 34, 35, and 40, and St. Matthews #3, except that if the Wake County Board of Elections provides that the area in Raleigh Township which was incorrectly placed in a St. Mary's precinct shall be in Raleigh Precinct 40, that area shall be considered to be in Raleigh Precinct 40 for district purposes. It has one judge.

(4) Superior Court District 10B consists of Buckhorn Precinct, Cary Precincts 1, 2, 3, 4, 5, 6, and 7, Cedar Fork Precinct, Holly Springs Precinct, House Creek Precinct #1, Meredith Precinct, Middle Creek Township, Raleigh Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 21, 23, 24, 27, 29, 31, 32, 33, 36, and 41, Swift Creek Precinct #1 and #2 and White Oak Township. It has two judges.

(5) Superior Court District 10C consists of Barton's Creek Precinct, Leesville Precinct, House Creek Precinct #2, Little River Township, Marks Creek Township, New Light Township, Panther Branch Township, St. Mary's Precincts #1, #2, #3, #4, #5, and #6, and Wake Forest Township. It has one judge.

(6) Superior Court District 10D consists of the remainder of Wake County not in Superior Court Districts 10A, 10B or 10C. It has one judge.

(7) Superior Court District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.

(8) Superior Court District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.

(9) Superior Court District 12C consists of the remainder of Cumberland County not in Superior Court Districts 12A or 12B. It has two judges.

(10) Superior Court District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.

(11) Superior Court District 14B consists of the remainder of Durham County not in Superior Court District 14A. It has three judges.

(12) Superior Court District 18A consists of Greensboro Precincts 5, 6, 7, 8, 9, 19, 25, 29, 30, 44, and 45 and Clay and Fentress Precincts. It has one judge.

(13) Superior Court District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21, Deep River Precinct, and Jamestown Precincts 1 and 3. It has one judge.

(14) Superior Court District 18C consists of Greensboro Precincts 20, 27, 31, 32, 34, 37, 38, 39, and 43, High Point Precinct 19, Stokesdale, Oak Ridge, Bruce, Friendship I, Friendship II, Jamestown II, South Center Grove, North Center Grove, and North Monroe Precincts. It has one judge.

(15) Superior Court District 18D consists of Greensboro Precincts 4, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 26, 36, and 42, and North and South Sumner Precincts. It has one judge.

(16) Superior Court District 18E consists of the remainder of Guilford County not in Superior Court Districts 18A, 18B, 18C, or 18D. It has one judge.

(17) Superior Court District 21A consists of the Southwest Ward of Winston-Salem, and Precincts 80-6, 80-7, 80-8, 3-1, 9-1, 13-1, 13-2, 13-3, 7-1, 7-2, 7-3, 5-1, 5-2, 5-3, 12-2, and 12-3. It has one judge.

(18) Superior Court District 21B consists of the Northwest Ward, the South Ward, and the Southeast Ward of Winston-Salem, and Precincts 4-1 and 4-2. It has one judge.

(19) Superior Court District 21C consists of Precincts 80-1, 80-2, 80-3, 80-4, 80-5, 80-9, 10-2, 10-3, 3-2, 3-3, 11-1, 11-2, 2-1, 6-1, 6-2, 6-3, 6-4, 1-1, 1-2, and 1-3. It has one judge.

(20) Superior Court District 21D consists of the North Ward, the Northeast Ward, and the East Ward of Winston-Salem, and Precincts 8-2 and 8-3. It has one judge.

(21) Superior Court District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.

(22) Superior Court District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.

(23) Superior Court District 26C consists of the remainder of Mecklenburg County not in Superior Court Districts 26A or 26B. It has two judges.

(c) In subsection (b) above:

(1) the names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;

(2) for Guilford County, precinct boundaries are as shown on maps in use by the Guilford County Board of Elections on April 15, 1987;

(3) for Mecklenburg, Wake, and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b);

(4) for Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987;

(5) for Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance with those as approved by the United States Department of Justice on February 28, 1986; and

(6) for Forsyth County, the boundaries of wards and precincts are those in effect on "WARD MAP 1985", published November 1985 by the City of Winston-Salem and Forsyth County.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the superior court districts; provided that if any of those boundaries have changed, a precinct is divided by a superior court judicial district boundary, and the precinct was not so divided at the time of enactment of this section in 1987, the boundaries of the superior court judicial district are changed to place the entirety of the precinct in the superior court judicial district where the majority of the residents of the precinct reside, according to the 1990 Federal Census if:

(1) Such change does not result in placing a superior court judge in another superior court district;

(2) Such change does not make a district that has an effective racial minority electorate not have an effective racial minority electorate; and

(3) The change is approved by the county board of elections where the precinct is located, State Board of Elections and by the Secretary of State upon finding that the change:

a. Will improve election administration; and

b. Complies with subdivisions (1) and (2) of this subsection.

(d) The several judges, their terms of office, and their assignments to districts are as follows:

(1) In the first superior court district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.

(2) In the second superior court district, William C. Griffin serves a term expiring December 31, 1994.

(3) In the third-A superior court district, David E. Reid serves a term expiring on December 31, 1992.
(4) In the third-B superior court district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.
(5) In the fourth-A superior court district, Henry L. Stevens, III, serves a term expiring December 31, 1994.
(6) In the fourth-B superior court district, James R. Strickland serves a term expiring December 31, 1992.
(7) In the fifth superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth superior court district, Napoleon B. Barefoot serves a term expiring December 31, 1994.
(8) In the sixth-A superior court district, Richard B. Allsbrook serves a term expiring December 31, 1990.
(9) In the sixth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(10) In the seventh-A superior court district, Charles B. Winberry, serves a term expiring December 31, 1994.
(11) In the seventh-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(12) In the seventh-C superior court district, Franklin R. Brown serves a term expiring December 31, 1990.
(13) In the eighth-A superior court district, James D. Llewellyn serves a term expiring December 31, 1994.
(14) In the eighth-B superior court district, Paul M. Wright serves a term expiring December 31, 1992.
(15) In the ninth superior court district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.
(16) In the tenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(17) In the tenth-B superior court district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Henry V. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.
(18) In the tenth-C superior court district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D superior court district, Donald Stephens serves a term expiring December 31, 1988.
(19) In the eleventh superior court district, Wiley F. Bowen serves a term expiring December 31, 1990.
(20) In the twelfth-A superior court district, D.B. Herring, Jr., serves a term expiring December 31, 1990.
(21) In the twelfth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
(22) In the twelfth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by

Coy E. Brewer, Jr., and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C superior court district, E. Lynn Johnson serves a term expiring December 31, 1994.

(23) In the thirteenth superior court district, Giles R. Clark serves a term expiring December 31, 1994.

(24) In the fourteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(25) In the fourteenth-B superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.

(26) In the fourteenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B superior court district, J. Milton Read, Jr., serves a term expiring December 31, 1994.

(27) In the fifteenth-A superior court district, J.B. Allen, Jr., serves a term expiring December 31, 1994.

(28) In the fifteenth-B superior court district, F. Gordon Battle serves a term expiring December 31, 1994.

(29) In the sixteenth-A superior court district, B. Craig Ellis serves a term expiring December 31, 1994.

(30) In the sixteenth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989. In the sixteenth-B judicial [superior court] district, a judge shall be appointed by the Governor to serve until the results of the 1990 general election are certified. A person shall be elected in the 1990 general election to serve the remainder of the term expiring December 31, 1996.

(31) In the seventeenth-A superior court district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.

(32) In the seventeenth-B superior court district, James M. Long serves a term expiring December 31, 1994.

(33) In the eighteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(34) In the eighteenth-B superior court district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(35) In the eighteenth-C superior court district, W. Douglas Albright serves a term expiring December 31, 1990.

(36) In the eighteenth-D superior court district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(37) In the eighteenth-E superior court district, Joseph John's term expired December 31, 1986, but he is holding over

because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(38) In the nineteenth-A superior court district, James C. Davis serves a term expiring December 31, 1992.

(39) In the nineteenth-B superior court district, Russell G. Walker, Jr., serves a term expiring December 31, 1990. No election shall be held in 1998 for the full term of the seat now occupied by Russell G. Walker, Jr., and the holder of that seat shall serve until a successor is elected in 2000 and qualifies. The succeeding term shall begin January 1, 2001.

(40) In the nineteenth-C superior court district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.

(41) In the twentieth-A superior court district, F. Fetzer Mills serves a term expiring December 31, 1992.

(42) In the twentieth-B superior court district, William H. Helms serves a term expiring December 31, 1990.

(43) In the twenty-first-A superior court district, William Z. Wood serves a term expiring December 31, 1990.

(44) In the twenty-first-B superior court district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.

(45) In the twenty-first-C superior court district, William H. Freeman serves a term expiring December 31, 1990.

(46) In the twenty-first-D superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(47) In the twenty-second superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-second superior court district, Robert A. Collier serves a term expiring December 31, 1994.

(48) In the twenty-third superior court district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.

(49) In the twenty-fourth superior court district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.

(50) In the twenty-fifth-A superior court district, Claude S. Sitton serves a term expiring December 31, 1994.

(51) In the twenty-fifth-B superior court district, Forrest A. Ferrell serves a term expiring December 31, 1990.

(52) In the twenty-sixth-A superior court district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and qualifies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(53) In the twenty-sixth-B superior court district, Frank W. Snepp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.

(54) In the twenty-sixth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and

qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C superior court district, Robert M. Burroughs serves a term expiring December 31, 1994.

(55) In the twenty-seventh-A superior court district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1, 1991. In the twenty-seventh-A superior court district, Robert W. Kirby serves a term expiring December 31, 1990.

(56) In the twenty-seventh-B superior court district, John M. Gardner serves a term expiring December 31, 1994.

(57) In the twenty-eighth superior court district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.

(58) In the twenty-ninth superior court district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.

(59) In the thirtieth-A superior court district, James U. Downs serves a term expiring December 31, 1990.

(60) In the thirtieth-B superior court district, Janet M. Hyatt serves a term expiring December 31, 1994. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6; 1987 (Reg. Sess., 1988), c. 1037, s. 1; c. 1056, ss. 14, 15; 1989, c. 795, s. 22(a); 1991, c. 746, s. 1; 1993, c. 321, ss. 200.4(a), 200.5(a), (d); 1995, c. 51, s. 1; c. 509, s. 3; 1995 (Reg. Sess., 1996), c. 589, s. 1(a), (c).)

Editor's Note. —

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5 provides that c. 589, s. 1, which amended this section, becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 1(b), provides: "The superior court judgeship held on June 12, 1996, in Superior Court District 20A by a resident of Moore County (James M. Webb) is allocated to Superior Court District 19B. The term of that judge expires December 31, 2000. The judge's successor shall be elected in the 2000 general election." Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 1 becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 1(b1) provides: "The superior court judgeship held on June 12, 1996, in Superior Court District 20A by a resident of Anson County (Donald R. Huffman) is allocated to Superior Court District 20A. The term of that judge expires December 31, 2000. The judge's successor shall be elected in the 2000 general election." Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 1 becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 4, provides: "Notwithstanding G.S. 7A-44.1, if any judge who on June 12, 1996, was a senior resident superior court judge ceases to be the senior resident superior court judge for a superior court district as a result of the transfer of a county from one superior court district to another, that judge may nevertheless appoint a judicial secretary to serve that judge's clerical and secretarial needs during that judge's continuation in office, at that judge's pleasure and under that judge's direction."

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5(b) provides: "The Superior Court election in Superior Court District 20A in the November 1996 general election for the seat of the superior court judge now residing in Anson County is not affected by this act and is conducted as previously provided by law."

Effect of Amendments. —

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 1(a) and (c), in subsection (a), added "Moore" to Superior Court District 19B and changed the number of resident judges from 1 to 2; and deleted "Moore" from Superior Court District 20A and changed the number of resident judges from 2 to 1; and added the last sentence of subdivision (d)(39). See Editor's Note for effective date.

§ 7A-41.2. (See editor's note) Nomination and election of regular superior court judges.

Candidates for the office of regular superior court judge shall be both nominated and elected by the qualified voters of the superior court district for which the election is sought. (1996, 2nd Ex. Sess., c. 9, s. 1.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 9, s. 23, provides: "Part 1 of this act becomes effective only if Parts 1 and 2 of this act are both effective under section 5 of the Voting Rights Act of 1965." Preclearance was received by letter dated October 1, 1996.

Session Laws 1996, Second Extra Session, c. 9, s. 24, makes this section effective upon ratification, and applicable beginning with the 1996 elections, except that Sections 1 and 2 of that act shall be applied to the 1994 general election and the results of that election validated and confirmed under those sections. The Act was ratified August 2, 1996. Preclearance was received by letter dated October 1, 1996.

§ 7A-42. Sessions of superior court in cities other than county seats.

(a) Sessions of the superior court shall be held in each city in the State which is not a county seat and which has a population of 35,000 or more, according to the 1960 federal census.

(a1) In addition to the sessions of superior court authorized by subsection (a) of this section, sessions of superior court in the following counties may be held in the additional seats of court listed by order of the Senior Resident Superior Court Judge after consultation with the Chief District Court Judge:

County	Additional Seats of Court
Davidson	Thomasville
Iredell	Mooresville

The courtrooms and related judicial facilities for these sessions of superior court may be provided by the municipality, and in such cases the facilities fee collected for the State by the clerk of superior court shall be remitted to the municipality to assist in meeting the expense of providing those facilities.

(b) For the purpose of segregating the cases to be tried in any city referred to in subsection (a), and to designate the place of trial, the clerk of superior court in any county having one or more such cities shall set up a criminal docket and a civil docket, which dockets shall indicate the cases and proceedings to be tried in each such city in his county. Such dockets shall bear the name of the city in which such sessions of court are to be held, followed by the word "Division." Summons in actions to be tried in any such city shall clearly designate the place of trial.

(c) For the purpose of determining the proper place of trial of any action or proceeding, whether civil or criminal, the county in which any city described in subsection (a) is located shall be divided into divisions, and the territory embraced in the division in which each such city is located shall consist of the township in which such city lies and all contiguous townships within such county, such division of the superior court to be known by the name of such city followed by the word "Division." All other townships of any such county shall constitute a division of the superior court to be known by the name of the county seat followed by the word "Division." All laws, rules, and regulations now or hereafter in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between such divisions within such county and as between each of such divisions and any other county of the superior court in North Carolina.

(d) The clerk of superior court of any county with an additional seat of superior court may, but shall not be required to, hear matters in any place other than at his office at the county seat.

(e) The grand jury for the several divisions of court of any county in which a city described in subsection (a) is located shall be drawn from the whole county, and may hold hearings and meetings at either the county seat or elsewhere within the county as it may elect, or as it may be directed by the judge holding any session of superior court within such county; provided, however, that in arranging the sessions of the court for the trial of criminal cases for any county in which any such city is located a session of one week or more shall be held at the county seat preceding any session of one week or more to be held in any such city, so as to facilitate the work of the grand jury, and so as to confine its meetings to the county seat as fully as may be practicable. All petit jurors for all sessions of court in the several divisions of such county shall be drawn, as now or hereafter provided by law, from the whole of the county in which any such city is located for all sessions of courts in the several divisions of such county.

(f) Special sessions of court for the trial of either civil or criminal cases in any city described in subsection (a) may be arranged as by law now or hereafter provided for special sessions of the superior court.

(g) All court records of all such divisions of the superior court of any such county shall be kept in the office of the clerk of the superior court at the county seat, but they may be temporarily removed under the direction and supervision of the clerk to any such division or divisions. No judgment or order rendered at any session held in any such city shall become a lien upon or otherwise affect the title to any real estate within such county until it has been docketed in the office of the clerk of the superior court at the county seat as now or may hereafter be provided by law; provided, that nothing herein shall affect the provisions of G.S. 1-233 and the equities therein provided for shall be preserved as to all judgments and orders rendered at any session of the superior court in any such city.

(h) It shall be the duty of the board of county commissioners of the county in which any such city is located to provide a suitable place for holding such sessions of court, and to provide for the payment of the extra expense, if any, of the sheriff and his deputies in attending the sessions of court of any such division, and the expense of keeping, housing and feeding prisoners while awaiting trial.

(i) Notwithstanding the provisions of this section, when exigent circumstances exist, sessions of superior court may be conducted at a location outside a county seat by order of the Senior Resident Superior Court Judge of a county, with the prior approval of the location and the facilities by the Administrative Office of the Courts and after consultation with the Clerk of Superior Court and county officials of the county. An order entered under this subsection shall be filed in the office of the Clerk of Superior Court in the county and posted at the courthouse within the county seat and notice shall be posted in other conspicuous locations. The order shall be limited to such session or sessions as are approved by the Chief Justice of the Supreme Court of North Carolina. (1943, c. 121; 1969, c. 1190, s. 48; 1987 (Reg. Sess., 1988), c. 1037, s. 2.1; 1997-304, s. 4.)

Effect of Amendments. — The 1997 amendment, effective July 7, 1997, added subsection (a1).

§ 7A-45. (Repealed effective January 1, 1989 — See editor's note) Special judges; appointment; removal; vacancies; authority.

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.6(b) provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through September 30, 2000."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

§ 7A-45.1. Special judges.

(a) Effective November 1, 1993, the Governor may appoint two special superior court judges to serve terms expiring September 30, 2000. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a1) Effective October 1, 1995, the Governor may appoint two special superior court judges to serve terms expiring September 30,

2000. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(a2) Effective December 15, 1996, the Governor may appoint four special superior court judges to serve terms expiring December 14, 2001. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to five-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters arising in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1987, c. 738, s. 123(a); 1987 (Reg. Sess., 1988), c. 1037, s. 5; 1993, c. 321, s. 200.5(g); 1995, c. 507, s. 21.1(f); 1996, 2nd Ex. Sess., c. 18, s. 22.6(a).)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.6(b) provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through September 30, 2000."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Effect of Amendments. — The 1996 Second Extra Session amendment, effective July 1, 1996, in subsection (a) substituted "September 30, 2000" for "December 31, 1998," substituted "five-year terms" for "four-year terms"; and added subsection (a2).

§ 7A-48. Jurisdiction of emergency judges.

CASE NOTES

Jurisdiction to Order Expenses and Fees Paid. — Emergency superior court judge commissioned to preside over a Special Session of County Superior Court continuing two weeks, or until the business was completed, had jurisdiction to sign order taxing deposition expenses and witness fees 6 weeks later. Hockaday v. Lee, 124 N.C. App. 425, 477 S.E.2d 82 (1996).

ARTICLE 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

§ 7A-54. Article applicable to judges retired under prior law.

CASE NOTES

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	9

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
2	Beaufort, Hyde, Martin, Tyrrell, Washington	5
3A	Pitt	9
3B	Carteret, Craven, Pamlico	10
4	Duplin, Jones, Onslow, Sampson	14
5	New Hanover, Pender	13
6A	Halifax	4
6B	Bertie, Hertford, Northampton	4
7	Edgecombe, Nash, Wilson	15
8	Greene, Lenoir, Wayne	11
9	Franklin, Granville, Vance, Warren	10
9A	Person, Caswell	4
10	Wake	28
11	Harnett, Johnston, Lee	14
12	Cumberland	17
13	Bladen, Brunswick, Columbus	9
14	Durham	12
15A	Alamance	7
15B	Orange, Chatham	7
16A	Scotland, Hoke	5
16B	Robeson	9
17A	Rockingham	5
17B	Stokes, Surry	5
18	Guilford	26
19A	Cabarrus	5
19B	Montgomery, Moore, Randolph	11
19C	Rowan	5
20	Anson, Richmond, Stanly, Union	14
21	Forsyth	15
22	Alexander, Davidson, Davie, Iredell	16
23	Alleghany, Ashe, Wilkes, Yadkin	5
24	Avery, Madison, Mitchell, Watauga, Yancey	4
25	Burke, Caldwell, Catawba	14
26	Mecklenburg	32
27A	Gaston	12
27B	Cleveland, Lincoln	8
28	Buncombe	10
29	Henderson, McDowell, Polk, Rutherford, Transylvania	11

Prosecutorial District	*Counties*	*No. of Full-Time Asst. District Attorneys*
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	7

(b) Except as provided in subsection (c) of this section, each district attorney for a prosecutorial district as defined in subsection (a1) of this section, other than District 19B, who is in office on December 31, 1988, shall continue in office for that prosecutorial district, for a term expiring December 31, 1990. In the general election of 1990, and every four years thereafter, a district attorney shall be elected for a four-year term for each prosecutorial district other than Districts 16A and 19B, and shall take office on the January 1 following such election. The district attorney for Prosecutorial District 19B, who is elected in the general election of 1988 for a four-year term beginning January 1, 1989, shall serve that term for Prosecutorial District 19B. In the general election of 1992, and every four years thereafter, a district attorney shall be elected for a four-year term for Prosecutorial Districts 16A and 19B and shall take office on the January 1 following such election.

(c) The office and term of the district attorney for Prosecutorial District 12 formerly consisting of Cumberland and Hoke Counties are allocated to Prosecutorial District 12 as defined by subsection (a1) of this section. The office and the term of the district attorney for former Prosecutorial District 16 consisting of Robeson and Scotland Counties are allocated to Prosecutorial District 16B as defined by subsection (a1) of this section. The initial district attorney for Prosecutorial District 16A as defined in subsection (a1) of this section shall be elected in the general election of November 1988, from nominations made in accordance with G.S. 163-114 as if a vacancy had occurred in nomination, and shall serve an initial term expiring December 31, 1992. In all other respects, subsection (b) of this section shall apply to the district attorneys for Prosecutorial Districts 12, 16A, and 16B to the same extent as all other district attorneys. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a); 1987 (Reg. Sess., 1988), c. 1056, s. 1; c. 1086, s. 111; 1989, c. 770, ss. 1, 56; c. 795, s. 24(a), (e); 1991, c. 742, s. 13; 1991 (Reg. Sess., 1992), c. 900, s. 120(a), (b); 1993, c. 321, ss. 200.4(*l*), 200.7(a), (b); 1995, c. 507, s. 21.7; 1995 (Reg. Sess., 1996), c. 589, s. 3(a); 1996, 2nd Ex. Sess., c. 18, s. 22(a); 1997-443, s. 18.11(a).)

Editor's Note. —

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 3(b) provides: "This section adds four additional assistant district attorneys in prosecutorial District 19B which shall be filled by the district attorney of that district. The General Assembly shall evaluate prior to July 1, 1998, whether the authorized nunmber of assistant district attorneys for District 20 should remain based on case load at 11 or some lower number not less than 9."

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 3 becomes effective January 4, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, ss. 5(c) and (d), concerning vacancies in assistant district attorney positions in Prosecutorial Districts 19B and 20, were repealed by Session Laws 1997, c. 443, s. 18.11(b).

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 3, amendment added "Moore" to Prosecutorial District 19B and changed the number of full-time Assistant District Attorneys from 5 to 9; and deleted "Moore" from Prosecutorial District 20. See Editor's Note for effective date.

Session Laws 1996, Second Extra Session, c. 18, s. 22, effective January 1, 1997, increased the number of full-time Assistant District Attorneys for each district except 19B and 20.

The 1997 amendment, effective December 1, 1997, increased the number of full-time Assistant District Attorneys for all districts except 1, 2, 6A, 6B, 15A, 17A, 17B, 19A, 19C, 23, 24, and 30.

§ 7A-61. Duties of district attorney.

CASE NOTES

Public Nuisance Actions. — The State, through the district attorney, has not only the authority, but also as an advocate of the State's interest in protecting society, an implied duty, to bring public nuisance actions. Whitfield v. Gilchrist, — N.C. App. —, 485 S.E.2d 61 (1997).

The State Constitution and §§ 7A-61, 147-89 and 19-2.1 do not prohibit a district attorney from employing private counsel to assist in public nuisance actions. Whitfield v. Gilchrist, — N.C. App. —, 485 S.E.2d 61 (1997).

Cited in In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

§ 7A-66. Removal of district attorneys.

CASE NOTES

Constitutionality. — This section does not violate the Constitution of North Carolina; thus, the superior court had jurisdiction to remove district attorney. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Purpose. — This section aims to create a procedure for the removal of district attorneys by the superior court. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Authority of General Assembly. — The General Assembly has the authority under the State Constitution to provide by statute for a method of removal of an individual holding the constitutional office of district attorney, although the Constitution does not itself specify any method whatsoever for removal of an individual from that office. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Neither Article IV, Section 18 nor any other provision of the Constitution of North Carolina prohibits the General Assembly from enacting a statutory method for the removal of district attorneys from office, so long as district attorneys whose removal from office is sought are accorded due process of law. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Use of Racial Epithets is Conduct Prejudicial to the Administration of Justice Which Brings the Office into Disrepute. — There could be no question that the use of racial epithets against a member of the public by a district attorney in an apparent attempt to provoke an affray in public was conduct prejudicial to the administration of justice which brings the office into disrepute. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

District attorney's abusive verbal attack on African-American man which gave rise to the inquiry removing him from office was not protected speech under the First Amendment. Instead, when taken in context, his repeated references to victim as a "nigger"presented a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the

United States or the Constitution of North Carolina. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

§ 7A-69. Investigatorial assistants.

The district attorney in prosecutorial districts 1, 3B, 4, 6B, 7, 8, 10, 11, 12, 14, 15A, 15B, 18, 20, 21, 24, 25, 26, 27A, 27B, 28, 29, and 30 is entitled to one investigatorial assistant to be appointed by the district attorney and to serve at his pleasure.

It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e); 1997-443, s. 18.16.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, rewrote the first paragraph of this section.

ARTICLE 11.

Special Regulations.

§ 7A-97. Court's control of argument.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996).

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

Population	*Annual Salary*
Less than 100,000	$62,676

Population	*Annual Salary*
100,000 to 149,999	70,403
150,000 to 249,999	78,130
250,000 and above	85,857.

The salary schedule in this subsection is intended to represent the following percentage of the salary of a chief district court judge:

Population	*Annual Salary*
Less than 100,000	73%
100,000 to 149,999	82%
150,000 to 249,999	91%
250,000 and above	100%.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Planning to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice or judge of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a); 1996, 2nd Ex. Sess., c. 18, s. 28.4; 1997-443, s. 33.9.)

Editor's Note. —

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective September 1, 1996, substituted "$60,265" for "$57,670," "67,695" for "64,780," "75,125" for "71,890," and "82,555" for "79,000" in subsection (a).

The 1997 amendment, effective July 1, 1997, increased the salaries for each population category in subsection (a).

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. The job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1995-96 because that person is at the top of the salary range as it existed for fiscal year 1994-95 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

Assistant Clerks and Head Bookkeeper	*Annual Salary*
Minimum	$23,420
Maximum	41,466

Deputy Clerks	*Annual Salary*
Minimum	$18,724
Maximum	31,940.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. The entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986),

c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s. 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12; 1995, c. 507, s. 7.6(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.5; 1997-443, ss. 33.12, 33.10(b).)

Editor's Note. —

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 33.10(a), provides: "Effective July 1, 1997, those State employees whose salaries are determined by G.S. 7A-102 shall receive across-the-board salary increases in the amount of four percent (4%) in lieu of step increases associated with their respective pay plans."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective September 1, 1996, substituted "$22,519" for "$21,549," "39,871" for "38,154," "$18,004" for "$17,229," and "30,712" for "29,389" in subsection (c1).

Session Laws 1997-443, ss. 33.10(b) and 33.12, effective July 1, 1997, increased the salaries in subsection (c1); and inserted "and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997" in subsection (d).

§ 7A-109. Record-keeping procedures.

(a) Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts. Except as prohibited by law, these records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained. The rules prescribed by the Director shall be designed to accomplish the following purposes:

(1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;

(2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case;

(3) To provide security against the loss or destruction of original documents during their useful life and a permanent record for historical uses;

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;

(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and

(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(b) The rules shall provide for indexing according to the minimum criteria set out below:

(1) Civil actions — the names of all parties;
(2) Special proceedings — the names of all parties;
(3) Administration of estates — the name of the estate and in the case of testacy the name of each devisee;
(4) Criminal actions — the names of all defendants;
(5) Juvenile actions — the names of all juveniles;
(6) Judgments, liens, lis pendens, etc. — the names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

(c) The rules shall require that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information.

(d) In order to facilitate public access to court records, except where public access is prohibited by law, the Director may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public.

(e) If any contracts entered into under G.S. 7A-109(d) [subsection (d) of this section] are in effect during any calendar year, the Director of the Administrative Office of the Courts shall submit to the Joint Legislative Commission on Governmental Operations not later than February 1 of the following year a report on all those contracts. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C.S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2; 1971, c. 192; c. 363, s. 6; 1997-199, s. 1.)

Editor's Note. —
Session Laws 1997-199, s. 2, effective June 19, 1997, was codified as subsection (e) at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1997 amendment, effective June 19, 1997, added subsection (d).

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

(a) **(See Editor's note)** Each district court district shall have the numbers of judges as set forth in the following table:

§ 7A-133(a) is set out twice. See notes.

District	Judges	County
1	4	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	3	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	4	Pitt
3B	4	Craven
		Pamlico
		Carteret
4	6	Sampson
		Duplin
		Jones
		Onslow
5	6	New Hanover
		Pender
6A	2	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	6	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance see subsection (b))
		Franklin
9A	2	Person
		Caswell
9B	1	Warren
		(part of Vance see subsection (b))
10	12	Wake
11	6	Harnett
		Johnston
		Lee
12	8	Cumberland
13	4	Bladen

§ 7A-133(a) is set out twice. See notes.

District	Judges	County
		Brunswick
		Columbus
14	5	Durham
15A	3	Alamance
15B	3	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	2	Rockingham
17B	3	Stokes
		Surry
18	11	Guilford
19A	3	Cabarrus
19B	5	Montgomery
		Moore
		Randolph
19C	3	Rowan
20	6	Stanly
		Union
		Anson
		Richmond
21	7	Forsyth
22	7	Alexander
		Davidson
		Davie
		Iredell
23	4	Alleghany
		Ashe
		Wilkes
		Yadkin
24	3	Avery
		Madison
		Mitchell
		Watauga
		Yancey
25	7	Burke
		Caldwell
		Catawba
26	14	Mecklenburg
27A	5	Gaston
27B	4	Cleveland
		Lincoln
28	5	Buncombe
29	5	Henderson
		McDowell
		Polk

§ 7A-133(a) is set out twice. See notes.

District	Judges	County
		Rutherford
		Transylvania
30	4	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(a) **(See Editor's note)** Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	4	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	3	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	4	Pitt
3B	5	Craven
		Pamlico
		Carteret
4	6	Sampson
		Duplin
		Jones
		Onslow
5	6	New Hanover
		Pender
6A	2	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	6	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene

§ 7A-133(a) is set out twice. See notes.

District	Judges	County
		Lenoir
9	4	Granville (part of Vance see subsection (b)) Franklin
9A	2	Person Caswell
9B	1	Warren (part of Vance see subsection (b))
10	12	Wake
11	6	Harnett Johnston Lee
12	8	Cumberland
13	5	Bladen Brunswick Columbus
14	5	Durham
15A	3	Alamance
15B	4	Orange Chatham
16A	3	Scotland Hoke
16B	5	Robeson
17A	2	Rockingham
17B	3	Stokes Surry
18	11	Guilford
19A	3	Cabarrus
19B	5	Montgomery Moore Randolph
19C	3	Rowan
20	7	Stanly Union Anson Richmond
21	7	Forsyth
22	8	Alexander Davidson Davie Iredell
23	4	Alleghany Ashe Wilkes Yadkin

§ 7A-133(a) is set out twice. See notes.

District	Judges	County
24	4	Avery
		Madison
		Mitchell
		Watauga
		Yancey
25	7	Burke
		Caldwell
		Catawba
26	14	Mecklenburg
27A	5	Gaston
27B	4	Cleveland
		Lincoln
28	5	Buncombe
29	5	Henderson
		McDowell
		Polk
		Rutherford
		Transylvania
30	4	Cherokee
		Clay
		Graham
		Haywood
		Jackson
		Macon
		Swain.

(b) For district court districts of less than a whole county, or with part or all of one county with part of another, the composition of the district is as follows:

(1) District Court District 9 consists of Franklin and Granville Counties and the remainder of Vance County not in District Court District 9B.

(2) District Court District 9B consists of Warren County and East Henderson I, North Henderson I, North Henderson II, Middleburg, Townsville, and Williamsboro Precincts of Vance County.

Precinct boundaries as used in this section for Vance County are those shown on maps on file with the Legislative Services Office on May 1, 1991, and for other counties are those reported by the United States Bureau of the Census under Public Law 94-171 for the 1990 Census in the IVTD Version of the TIGER files.

(c) Each county shall have the numbers of magistrates and additional seats of district court, as set forth in the following table:

County	Magistrates Min.-Max.		Additional Seats of Court
Camden	1	2	

County	Magistrates Min.-Max.		Additional Seats of Court
Chowan	2	3	
Currituck	1	3	
Dare	3	8	
Gates	2	3	
Pasquotank	3	5	
Perquimans	2	3	
Martin	5	8	
Beaufort	4	8	
Tyrrell	1	3	
Hyde	2	4	
Washington	3	4	
Pitt	10	12	Farmville Ayden
Craven	7	10	Havelock
Pamlico	2	3	
Carteret	5	8	
Sampson	6	8	
Duplin	9	11	
Jones	2	3	
Onslow	8	14	
New Hanover	6	11	
Pender	4	6	
Halifax	9	14	Roanoke Rapids, Scotland Neck
Northampton	5	7	
Bertie	4	6	
Hertford	5	6	
Nash	7	10	Rocky Mount
Edgecombe	4	7	Rocky Mount
Wilson	4	7	
Wayne	5	12	Mount Olive
Greene	2	4	
Lenoir	4	10	La Grange
Granville	3	7	
Vance	3	6	
Warren	3	4	
Franklin	3	7	
Person	3	4	
Caswell	2	5	
Wake	12	20	Apex, Wendell, Fuquay-Varina, Wake Forest
Harnett	7	11	Dunn

County	Magistrates Min.-Max.		Additional Seats of Court
Johnston	10	12	Benson, Clayton, Selma
Lee	4	6	
Cumberland	10	18	
Bladen	4	6	
Brunswick	4	7	
Columbus	6	9	Tabor City
Durham	8	13	
Alamance	7	10	Burlington
Orange	4	11	Chapel Hill
Chatham	3	8	Siler City
Scotland	3	5	
Hoke	4	5	
Robeson	8	16	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
Rockingham	4	9	Reidsville, Eden, Madison
Stokes	2	5	
Surry	5	9	Mt. Airy
Guilford	20	26	High Point
Cabarrus	5	9	Kannapolis
Montgomery	2	4	
Randolph	5	10	Liberty
Rowan	5	10	
Stanly	5	6	
Union	4	6	
Anson	4	5	
Richmond	5	6	Hamlet
Moore	5	8	Southern Pines
Forsyth	3	15	Kernersville
Alexander	2	3	
Davidson	7	10	Thomasville
Davie	2	3	
Iredell	4	9	Mooresville
Alleghany	1	2	
Ashe	3	4	
Wilkes	4	6	
Yadkin	3	5	
Avery	3	4	
Madison	4	5	

County	Magistrates Min.-Max.		Additional Seats of Court
Mitchell	3	4	
Watauga	4	6	
Yancey	2	4	
Burke	4	7	
Caldwell	4	7	
Catawba	6	10	Hickory
Mecklenburg	15	26	
Gaston	11	21	
Cleveland	5	8	
Lincoln	4	7	
Buncombe	6	15	
Henderson	4	7	
McDowell	3	5	
Polk	3	4	
Rutherford	6	8	
Transylvania	2	4	
Cherokee	3	4	
Clay	1	2	
Graham	2	3	
Haywood	5	7	Canton
Jackson	3	4	
Macon	3	4	
Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9; 1995, c. 507, s. 21.1(c); 1995 (Reg. Sess., 1996), c. 589, s. 2(a); 1996, 2nd Ex. Sess., c. 18, ss. 22.4, 22.7(a); 1997-443, ss. 18.12(a), 18.13.)

Subsection (a) Set Out Twice. — The first version of subsection (a) set out above is effective January 1, 1997, until the second version becomes effective. The second version of subsection (a) set out above is effective December 1, 1997, as to any district where no county is subject to section 5 of the Voting Rights Act of 1965. As to any district where any county is subject to section 5 of the Voting Rights Act of 1965, the second version of subsection (a) is effective December 1, 1997, or 15 days after the date upon which that subsection is approved under section 5 of the Voting Rights Act.

Editor's Note. —

As noted in the main pamphlet, Session Laws 1993, c. 321, s. 200.6, as amended by Session Laws 1994 Extra Session, c. 6, ss. 1 and 2, increased by one the number of judges in Districts 1, 3A, 8, 12, 18, and 20. These amendments, however, were subject to preclearence by the U.S. Department of Justice, and it initially interposed objection. Objection has since been withdrawn, and the amendments have now been given effect.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 2 becomes effective January 1, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 2(b), as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.8(a) provides: "The district court judgeship held on June 12, 1996, in District Court District 20 by a resident of Moore County (Jayrene Russell Maness) is allocated to District Court District 19B. The district court judgeship held on June 12, 1996, in District Court District 20 by a resident of Moore County (Michael Earle Beale) is allocated to District Court District 20. The term of each of these judges expires December 7, 1998. A successor to each judge shall be elected in the 1998 general election." Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 2 becomes effective January 1, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 2(c) provides: "Each district court judgeship held on June 12, 1996, in District Court District 20 by a resident of Anson, Richmond, Stanly, or Union County (Ronald W. Burris, Tanya Wallace, Christopher W. Bragg, Susan C. Taylor, and Joseph J. Williams) is allocated to District Court District 20. The terms of Judges Burris, Wallace, Bragg, and Williams expire December 2, 1996. A successor to each judge shall be elected in the 1996 general election. The term of Judge Taylor expires December 7, 1998. A successor shall be elected in the 1998 general election." Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 2 becomes effective January 1, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 2(d), as amended by Session Laws 1996, Second Extra Session, c. 18, s. 22.8(b), provides: "The effect of subsections (a) through (c) of this section is also to add an additional district court judgeship in District Court District 19B effective January 1, 1997. The Governor shall appoint a person to fill the vacancy for the remainder of the term expiring the first Monday in December of 1998." Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 5, provides that c. 589, s. 2 becomes effective January 1, 1997, or the date upon which that section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated December 16, 1996.

Session Laws 1996, Second Extra Session, c. 18, s. 22.7(c) provides that the amendment by Session Laws 1996, Second Extra Session, c. 18, s. 22.7, becomes effective December 15, 1996, as to any district court district where no county is subject to section 5 of the Voting Rights Act of 1965. As to any district court district where any county is subject to section 5 of the Voting Rights Act of 1965, the amendment becomes effective December 15, 1996, or 15 days after the date upon which it is approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S.Department of Justice by letter dated November 25, 1996.

Session Laws 1996, Second Extra Session, c. 18, s. 22.7(b), provides that the Governor shall appoint additional district court judges for District Court Districts 12, 16A, and 23 as authorized by that act, and that those judges' successors shall be elected in the 2000 general election for a four-year term commencing on the first Monday in December 2000.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1997-443, s. 18.12 (a), which amended subsection (a), provides in s. 18.12(c): "Subsection (a) of this section becomes effective December 1, 1997, as to any district where no county is subject to Section 5 of the Voting Rights Act of 1965. As to any district where any county is subject to Section 5 of the Voting Rights Act of 1965, subsection (a) of this section becomes effective December 1, 1997, or 15 days after the date upon which that subsection is approved under Section 5 of the Voting Rights Act."

Session Laws 1997-443, s. 18.12(b), provides: "The Governor shall appoint additional district court judges for District Court Districts 3B, 13, 15B, 20, 22, and 24 as authorized by subsection (a) of this section. Those judges' successors shall be elected in the 2000 election for four-year terms commencing on the first Monday in December 2000."

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1997-456, s. 56.7, effective August 29, 1997, provided in part that the funds appropriated to the Judicial Department could be used by the Department to establish a magistrate position in Davidson County.

Effect of Amendments. —

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 2, amendment added "Moore" to District 19B and changed the number of judges from 3 to 5; and deleted "Moore" from District 20 and changed the number of judges from 7 to 6. See Editor's note for effective date.

Session Laws 1996, Second Extra Session, c. 18, s. 22.4, effective July 1, 1996, in subsection (c), increased the maximum number of magistrates for Northampton, Bertie, Vance, Randolph, Lincoln, and Henderson counties.

Session Laws 1996, Second Extra Session, c. 18, s. 22.7, increased the number of judges for Cumberland, Scotland, and Alleghany counties. For effective date, see Editor's note.

Session Laws 1997-443, s. 18.12(a), in subsection (a), increased the number of judges in districts 3B, 13, 15B, 20, 22, and 24. See Editor's Note for effective date.

Session Laws 1997-443, s. 18.13, effective July 1, 1997, in subsection (c), increased the maximum number of magistrates in the counties of Edgecombe, Wilson, Wayne, Franklin, Cumberland, Columbus, Durham, and Gaston.

ARTICLE 16.

Magistrates.

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.

Table of Salaries of Full-Time Magistrates

Step Level	*Annual Salary*
Entry Rate	*$24,471*
Step 1	*26,927*
Step 2	*29,600*
Step 3	*32,516*
Step 4	*35,711*
Step 5	*39,922*
Step 6	*43,083.*

(2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

(3) Notwithstanding any other provision of this subsection, an individual who, when initially appointed as a full-time magistrate, is licensed to practice law in North Carolina, shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. An individual who, when initially appointed as a part-time magistrate, is licensed to practice law in North Carolina, shall be paid an annual salary based on that for Step 4 and determined according to the formula in subdivision (2) of this subsection. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. The salary of a full-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving a salary at a level lower than Step 4 shall be adjusted to Step 4 and, thereafter, shall advance in accordance with the Table's schedule. The salary of a part-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving an annual salary as determined by subdivision (2) of this subsection based on a salary level lower than Step 4 shall be adjusted to a salary based on Step 4 in the Table and, thereafter, shall advance in accordance with the provision in subdivision (2) of this subsection.

(a1) **(Effective until June 30, 1999)** Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

(1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

1 or more but less than 3 years of service	*20,279*
3 or more but less than 5 years of service	*22,373.*

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

(2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

Salary Level on June 30, 1994	*Salary Level on July 1, 1994*
5 or more but less than 7 years of service	*Entry Rate*
7 or more but less than 9 years of service	*Step 1*
9 or more but less than 11 years of service	*Step 2*
11 or more years of service	*Step 3.*

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

(4) The salaries of "part-time magistrates" shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 698, ss. 13(a), (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c); 1995, c. 507, s. 7.7(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.6(a), (b).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The

Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 33.11, provides: "Effective July 1, 1997, magistrates shall receive salary increases in the amount of four percent (4%), except that any person entitled to a step increase pursuant to G.S. 7A-171.1 for the 1997-98 fiscal year shall not receive the four percent increase provided by this act."

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Effect of Amendments. — Session Laws 1996, Second Extra Session, c. 18, ss. 28.6(a) and 28.6(b), effective September 1, 1996, raised the annual salary of full-time magistrates for each step level in subdivision (a)(1); and in subdivision (a1)(1) deleted "Less than 1 year of service" and "$18,457," and substituted "20,279" for "19,406" and "22,273" for "21,314."

§ 7A-173. Suspension; removal; reinstatement.

CASE NOTES

Grounds for suspension or removal of a magistrate are the same as for a judge of the General Court of Justice. In re Kiser, — N.C. App. —, 484 S.E.2d 441 (1997).

Article 18.

District Court Practice and Procedure Generally.

§ 7A-191.1. Recording of proceeding in which defendant pleads guilty or no contest to felony in district court.

The trial judge shall require that a true, complete, and accurate record be made of the proceeding in which a defendant pleads guilty or no contest to a Class H or I felony pursuant to G.S. 7A-272. (1995 (Reg. Sess., 1996), c. 725, s. 4.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 725, s. 11, made this section effective December 1, 1996, and applicable to offenses committed on or after that date.

§ 7A-198. Reporting of civil trials.

(a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Reporting will not be provided in trials before magistrates or in hearings to adjudicate and dispose of infractions in the district court.

(f) Appointment of a reporter or reporters for district court proceedings in each district court district shall be made by the chief district judge for that district. The compensation and allowances of reporters in each district shall be fixed by the chief district judge, within limits determined by the Administrative Officer of the Courts, and paid by the State.

(g) A party to a civil trial in district court may request a private agreement from the opposing party or parties to share equally in the cost of a court reporter to be selected from a list provided by the Administrative Office of the Courts. If the opposing party does not consent to share this cost, the requesting party may nevertheless pay to have a court reporter present to record the trial and, in the event that the opposing party appeals the case, that party shall reimburse the party providing the court reporter in full for the costs incurred for the court reporter's services and transcripts.

In the event that the recording device in a civil trial conducted without a court reporter fails for any reason to provide a reasonably accurate record of the trial for purposes of appeal, then the trial judge shall grant a motion for a new trial made by a losing party whose request pursuant to this section to share the cost of a court reporter was not consented to by the opposing party. (1965, c. 310, s. 1; 1969, c. 1190, s. 18; 1985, c. 764, s. 13; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 384, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 19; 1996, 2nd Ex. Sess., c. 18, s. 22.11.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective July 1, 1996, added subsection (g).

CASE NOTES

Cited in Pollock v. Parnell, — N.C. App. —, 484 S.E.2d 864 (1997).

Article 19.

Small Claim Actions in District Court.

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

CASE NOTES

Magistrate Cannot Extend Time to Pay Fees. — Magistrate did not have the authority under § 1A-1, Rule 60(b) to extend the time provided in this section for party to pay appeal fees. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Dismissal Not Proper. — Because this section refers to the failure of the appellant to appear and prosecute his appeal once the appeal is docketed and regularly set for trial, dismissal for failure to prosecute was not proper. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

Applied in Stephens v. John Koenig, Inc., 119 N.C. App. 323, 458 S.E.2d 233 (1995).

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

CASE NOTES

Challenge to HIV Testing Rule. — This section confered jurisdiction on the superior court to determine whether a Commission for Health Services Rule (15A NCAC 19A.0102(a)(3)), eliminating anonymous HIV testing, was unconstitutional. Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

§ 7A-246. Special proceedings; exceptions; guardianship and trust administration.

CASE NOTES

Cited in In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

OPINIONS OF ATTORNEY GENERAL

Preneed Funeral Contracts. — If a purchaser or beneficiary of a preneed contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and, a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

ARTICLE 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-260. Review of transfer matters.

CASE NOTES

Applied in Flynn v. Flynn, — N.C. App. —, 485 S.E.2d 866 (1997).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.

(a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

(b) The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment.

(c) With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:

(1) The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or

(2) The defendant has been indicted for a criminal offense but the defendant's case is transferred from superior court to district court pursuant to G.S. 15A-1029.1.

(d) Provisions in Chapter 15A of the General Statutes apply to a plea authorized under subsection (c) of this section as if the plea had been entered in superior court, so that a district court judge is authorized to act in these matters in the same manner as a superior court judge would be authorized to act if the plea had been entered in superior court, and appeals that are authorized in these matters are to the appellate division. (1965, c. 310, s. 1; 1995 (Reg. Sess., 1996), c. 725, ss. 1, 2.)

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 725, ss. 1 and 2, effective December 1, 1996, and applicable to offenses committed on or after that date, added "concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable" to the end of the catchline; and added subsections (c) and (d).

Article 24.

Juvenile Services.

§ 7A-289.2. Definitions.

The terms or phrases used in this Article shall be defined according to the definitions contained in G.S. 7A-517 and as follows, unless the context or subject matter otherwise requires:

(1) "Administrator" is the Administrator for Juvenile Services in the Administrative Office of the Courts who is responsible for planning, organizing and administering a statewide system of juvenile probation and aftercare services as authorized by this Article.

(2) "Aftercare" means the legal status of a child who has been committed by the court to the Department of Correction for placement by said agency in one or more of its institutions or programs and who is being granted conditional release to return to the community as authorized by G.S. 7A-655.

(3) "Chief court counselor" is the professional person responsible for administration and supervision of juvenile probation and aftercare in each district court district under the supervision of the court and the Administrator for Juvenile Services.

(4) "Court counselor" is a professional person responsible for juvenile probation and aftercare services to children on probation or on conditional release from the Division of Youth Services, Department of Health and Human Services under the supervision of the chief court counselor.

(5) "Director" is the Director of the Administrative Office of the Courts.

(6) "Division" is the Division of Juvenile Services to administer juvenile probation and aftercare services to juveniles as authorized by this Article.

(7) "Probation" means the legal status of a child who is delinquent or undisciplined and is placed on probation as authorized by G.S. 7A-649(8) under conditions of probation related to the needs of the child as authorized in that statute. (1973, c. 1262, s. 10; c. 1339, s. 1; 1981, c. 469, s. 21; 1987 (Reg. Sess., 1988), c. 1037, s. 21; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§ 7A-289.13. Legislative intent.

The General Assembly hereby declares its intent to reduce the number of children committed by the courts for delinquency to institutions operated by the Division of Youth Services, Department of Health and Human Services or other State agencies. The primary intent of this Article is to provide a comprehensive plan for the development of community-based alternatives to training school commitment so that "status offenders" (defined by this Article to include "those juveniles guilty of offenses which would not be violations of the law if committed by an adult") may be eliminated from the youth development institutions of this State. Additionally it is the intent of this legislation to provide noninstitutional disposition options in any case before the juvenile court where this disposition is considered in the best interest of the child and the community.

The policy and intent of the General Assembly in delinquency prevention and community-based services can be summarized as follows:

(1) These programs shall be planned and organized at the community level within the State, and these planning efforts shall include appropriate representation from local government, local public and private agencies serving families and children, local business leaders, citizens with an interest in youth problems, youth representatives, and others as may be appropriate in a particular community. The role of the State shall be to provide technical assistance, access to funding, and program information, and to assist local leadership in appropriate planning.

(1a) As a prerequisite for receiving funding for Community-Based Alternatives, each county shall appoint a Community-Based Alternatives Youth Services Advisory Committee and shall update and revise the Committee's membership to ensure appropriate representation. As vacancies occur on Community-Based Alternatives Youth Services Advisory Committees or as new committees are appointed. The committee members shall be reflective of the racial and socioeconomic diversity of the community.

(1b) The Community-Based Alternatives Youth Services Advisory Committee required by subdivision (1a) of this section shall annually review the needs of troubled juveniles within its county, develop and advertise a Request for Proposal process, and submit a written Plan of Action for the expenditure of Community-Based Alternatives funds to the county for its approval. Upon the county's authorization, the Plan shall be submitted to the Department of Health and Human Services for final approval and subsequent implementation.

(1c) The Division of Youth Services shall develop and implement uniform standards for each county's Community-Based Alternative Youth Services Advisory Committee's annual certification and written requirements for program planning including a standard format for the Request for Proposal.

(2) When a child is adjudicated to be within the juvenile jurisdiction of the district court, this child should be carefully evaluated through the available community-level resources, including mental health, social services, public health and other available medical services, public schools, and other appropriate services, prior to the juvenile hearing dealing with disposition so that the disposition of the court may be made with an understanding of the needs of the child and after consideration of the resources available to meet these needs.

(3) It is contrary to the policy of the State for a court to separate a child from the child's own family or commit a child to an institution or training school without a careful evaluation of the needs of the child.

(4) The General Assembly finds that State and local government shall be responsive to the need for community-based services that would provide a viable alternative to commitment to an institution or training school. The General Assembly intends that State government should be responsive to this need through the Department of Health and Human Services by helping public and private local groups to plan, develop, and fund community-based programs, both residential and nonresidential. The General Assembly recognizes that these efforts will require the cooperation of several major State departments in addition to Health and Human Services, such as the Department of Public Instruction, the Administrative Office of the Courts, and the Governor's Crime Commission of the Department of Crime Control and Public Safety.

(5) It is the intent of the General Assembly that the Secretary of the Department of Health and Human Services develop a funding mechanism that will provide State support for programs that meet the standards as developed under the provisions of this Article.

The Secretary of the Department of Health and Human Services shall adopt rules to implement this section. (1975, c. 929; 1977, c. 627, ss. 18, 19; 1994, Ex. Sess., c. 24, s. 35(a); 1997-443, s. 11A.118(a).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

Legal Periodicals. — For note, "Holding a Child in Contempt," see 46 Duke L.J. 353 (1996).

§ 7A-289.14. Duties of Secretary of Health and Human Services.

It shall be the duty of the Secretary of Health and Human Services to arrange for the appropriate unit or units of the Department of Health and Human Services to implement this Article as follows:

(1) To designate the appropriate unit of the Department of Health and Human Services to be responsible for coordination of state-level services in relation to delinquency prevention and youth services so that any citizen may go to one place in State government to receive services or access to services.

(2) Repealed by Session Laws 1977, c. 627, s. 20.

(3) To arrange appropriate coordination and planning within the child-serving agencies of the Department of Health and Human Services and promote interdepartmental coordination.

(4) To assist local governments and private service agencies in the development of community-based programs, and to provide information on the availability of potential funding sources and whatever assistance may be requested in making application for needed funding.

(5) To approve yearly program evaluations and to make recommendations to the General Assembly concerning continuation funding that might be supported by that evaluation.

(6) To approve program evaluation standards by which all programs developed under the provisions of this Article may be objectively evaluated.

Such standards as may be developed for the purpose of program evaluation shall be in addition to any current standards as may be applicable under the existing authority of the Social Services Commission and the Department of Health and Human Services.

Minimum operating standards as well as program evaluation standards as may be needed for new program models designed to fulfill the intent of this Article, may be developed at the discretion of the Secretary either by the Social Services Commission or the Secretary.

(7) To develop a formula for funding on a matching basis community-based services as provided for in this Article. This formula shall be based upon the county's or counties' relative ability to fund community-based programs for juveniles.

Local governments receiving State matching funds for programs under the provisions of this Article must maintain the same overall level of effort that existed at the time of the filing of the county assessment of youth needs with the Department of Health and Human Services as provided in G.S. 7A-289.16 of this Article. (1975, c. 929; 1977, c. 627, ss. 20-23; 1981, c. 50, s. 5; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 7A-289.15. Purchase of care or services from programs meeting State standards.

The Department of Health and Human Services and any other appropriate State or local agency are hereby authorized to purchase care or services from public or private agencies providing delinquency prevention programs or community-based services, provided the program meets the State standards as authorized by G.S. 7A-289.14. As institutional populations are reduced, the Department of Health and Human Services may divert State funds appropriated for institutional programs to purchase such services, pursuant to the provisions of the Executive Budget Act.

The Secretary of Health and Human Services shall prepare an annual report on the progress of the community-based programs of this State which shall include the most current institutional populations of children being served by the various departments of State government which shall include comparative costs of all child-serving agencies. Such report shall be submitted to the Governor, the General Assembly and the various State departments providing services to children. (1975, c. 929; 1977, c. 627, s. 24; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 7A-289.16. County assessment of youth needs.

The board of county commissioners of each participating county shall conduct or arrange for a study of youth needs in the county, giving particular attention to the need for delinquency prevention programs and community-based services (residential or nonresidential) which would provide an alternative to commitment to training school. The board of county commissioners may delegate the responsibility to any appropriate board or department of county government, or it may contract with an appropriate private agency or group for the study. Adjoining counties may cooperate in conducting such study on a regional basis, utilizing appropriate public or private resources.

The board of county commissioners of any county may request technical assistance from the Secretary of Health and Human Services in conducting such study. Each participating county shall develop a study plan for submission to the Secretary of Health and Human Services by January 1, 1976. Each participating county shall file a report of preliminary findings from such study to the Secretary of Health and Human Services by January 1, 1977, and its full report by January 1, 1978. Each participating county shall plan for a continuing assessment of youth needs in the county or region with annual reports to the Secretary of Health and Human Services. (1975, c. 929; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

ARTICLE 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

CASE NOTES

Cited in In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

§ 7A-289.23. Jurisdiction.

CASE NOTES

Right to Effective Assistance of Counsel. —

The right to counsel provided by this section includes the right to effective assistance of counsel. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was so serious as to deprive the represented party of a fair hearing. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

§ 7A-289.24. Who may petition.

A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or

(2) Any person who has been judicially appointed as the guardian of the person of the child; or

(3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition; or

(6) Any guardian ad litem appointed to represent the minor child pursuant to G.S. 7A-586, who has not been relieved of this responsibility and who has served in this capacity for at least one continuous year; or

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes. (1977, c. 879, s. 8; 1983, c. 870, s. 1; 1985, c. 758, s. 1; 1987, c. 371, s. 2; 1995 (Reg. Sess., 1996), c. 690, s. 4.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective July 1, 1996, substituted "services, consolidated county human services agency, or" for "services or" in subdivisions (3) and (4).

§ 7A-289.25. Petition.

CASE NOTES

Service Held Sufficient. — Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by this section, where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with § 1A-1, Rule 4(j1), and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

§ 7A-289.27. Issuance of summons.

CASE NOTES

Where the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, etc. —

Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by § 7A-289.25, where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with § 1A-1, Rule 4(j1), and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Service of petition and summons to terminate parental rights by publication must comply with this section and § 1A-1, Rule 4(j1). In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

§ 7A-289.29. Answer of respondents.

CASE NOTES

Stated in In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

§ 7A-289.30. Adjudicatory hearing on termination.

CASE NOTES

Evidence Held Insufficient. — Evidence held insufficient to support the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

§ 7A-289.31. Disposition.

CASE NOTES

Evidence Held Insufficient. — Evidence held insufficient to support the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

§ 7A-289.32. Grounds for terminating parental rights.

The court may terminate the parental rights upon a finding of one or more of the following:

(1) Repealed by Session Laws 1979, c. 669, s. 2.

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).

(3) The parent has willfully left the child in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty.

(3a) The burden in such proceedings shall be upon the petitioner to prove the facts justifying such termination by clear and convincing evidence.

(4) The child has been placed in the custody of a county Department of Social Services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

- a. Establish(ed) paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
- b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
- c. Legitimated the child by marriage to the mother of the child; or

d. Provided substantial financial support or consistent care with respect to the child and mother.

(7) That the parent is incapable of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

(8) The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. For the purpose of this subdivision, a child may be willfully abandoned by his or her natural father if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of such birth; but in any event the child must be over the age of three months at the time of the filing of the petition. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2; 1983, c. 89, s. 2; c. 512; 1985, c. 758, ss. 2, 3; c. 784; 1991 (Reg. Sess., 1992), c. 941, s. 1; 1997-390, ss. 1, 2; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-390, ss. 1 and 2, effective October 1, 1997, and applicable to actions commenced on and after that date, rewrote subdivisions (3) and (7).

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

I. General Consideration.
V. Illustrative Cases.
VI. Willfully Leaving Child in Foster Care.

I. GENERAL CONSIDERATION.

Due Process. — Conduct inconsistent with a parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

Construction with Other Sections. — It is not necessary for there to be evidence of mental retardation, mental illness, organic brain syndrome, or some other degenerative mental condition, which would be required in a termination of parental rights determination pursuant to subsection (7), for the evidence to be sufficient in a § 7A-657 review hearing to evince a lack of ability to perform mentally that impedes a parent's child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995).

Standard of Review. — On review, the Court of Appeals must determine whether the trial court's findings of fact were based on clear, cogent and convincing evidence, and whether those findings of fact supported a conclusion that parental termination should occur on the grounds stated in this section. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

V. ILLUSTRATIVE CASES.

Rights Not Properly Terminated. —

Evidence held insufficient to support

the grounds for termination of parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).

VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.

"Willful" Defined. — Under this section, willfulness means something less than willful abandonment. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

Showing of Fault Not Required. — A finding of willfulness does not require a showing of fault by the parent. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

Leaving Held "Willful." — Even though respondent attempted to regain custody of her child, willfulness could still be found under subsection (3) because the child was left in foster care for over twelve months and respondent did not show reasonable progress or a positive response toward the diligent efforts of the Department of Social Services. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars ($5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of six dollars ($6.00) in the district court, including cases before a magistrate, and the sum of twenty-four dollars ($24.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to

establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of seven dollars and twenty-five cents ($7.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents ($5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents ($1.25) being administered in accordance with the provisions of G.S. 143-166.50(e). One dollar ($1.00) of this sum shall be administered as is provided in Article 12F of Chapter 143 of the General Statutes.

(3a) For the supplemental pension benefits of sheriffs, the sum of seventy-five cents (75¢) to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of sixty-one dollars ($61.00) in the district court, including cases before a magistrate, and the sum of sixty-eight dollars ($68.00) in the superior court, to be remitted to the State Treasurer.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars ($15.00) to be remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, for the issuance by the clerk of a report to the Division of Motor Vehicles pursuant to G.S. 20-24.2, the sum of fifty dollars ($50.00), to be remitted to the State Treasurer. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee.

(a1) Repealed by Session Laws 1997-475, s. 4.1, effective September 1, 1997.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

(1) Costs due the county;
(2) Costs due the city;
(3) Fines to the county school fund;
(4) Sums in restitution prorated among the persons entitled thereto;
(5) Costs due the State;
(6) Attorney's fees.

Sums in restitution received by the clerk of superior court shall be disbursed when:

(1) Complete restitution has been received; or
(2) When, in the opinion of the clerk, additional payments in restriction will not be collected; or
(3) Upon the request of the person or persons entitled thereto; and
(4) In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 22.13(a); 1997-475, s. 4.1.)

Editor's Note. —
Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective September 1, 1996, and applicable to fees assessed or paid on or after that date, in subdivision (a)(4) substituted "forty-six dollars ($46.00)" for "forty-one dollars ($41.00)," and substituted "fifty-three dollars ($53.00)" for "forty-eight dollars ($48.00)."

The 1997 amendment, effective September 1, 1997, and applicable to fees assessed or paid on or after that date, in subdivision (a)(4) substituted "sixty-one dollars ($61.00)" for "forty-six dollars ($46.00)" and "sixty-eight dollars ($68.00)" for "fifty-three dollars ($53.00)"; and deleted subsection (a1) regarding payment of costs pursuant to former G.S. 20-7.2.

§ 7A-305. Costs in civil actions.

CASE NOTES

Fees of Guardian ad Litem. — Having properly appointed guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997).

In an action for ejectment, § 6-19 of the General Statutes was applicable, and therefore, the list of costs recoverable by a prevailing party in a civil action under this section was controlling. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of four dollars ($4.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of twenty-six dollars ($26.00), plus an additional forty cents (40¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed three thousand dollars ($3,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be ten dollars ($10.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed three thousand dollars ($3,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of fifteen dollars ($15.00) shall be assessed on the filing of each annual and final account.

(2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of seventeen dollars ($17.00).

(b) In collections of personal property by affidavit, the facilities fee and twenty-six dollars ($26.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the thirty dollars ($30.00) shall be paid at the time of the qualification of the fiduciary.

(b1) The clerk shall assess the following miscellaneous fees:

(1) Filing and indexing a will with no probate	
— first page	$ 1.00
— each additional page or fraction thereof	.25
(2) Issuing letters to fiduciaries, per letter over five letters issued	1.00
(3) Inventory of safe deposits of a decedent, per box, per day	15.00
(4) Taking a deposition	5.00
(5) Docketing and indexing a will probated in another county in the State	
— first page	1.00
— each additional page or fraction thereof	.25
(6) Hearing petition for year's allowance to surviving spouse or child, in cases not assigned to a magistrate, and allotting the same	4.00

(c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1;

1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5; 1997-310, s. 4.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to applications for year's allowances filed on or after that date, added subdivision (b1)(6).

§ 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1) Foreclosure under power of sale in deed of trust or mortgage $30.00
If the property is sold under the power of sale, an additional amount will be charged, determined by the following formula: thirty cents (30¢) per one hundred dollars ($100.00), or major fraction thereof, of the final sale price. If the amount determined by the formula is less than ten dollars ($10.00), a minimum ten dollar ($10.00) fee will be collected. If the amount determined by the formula is more than two hundred dollars ($200.00), a maximum two hundred dollar ($200.00) fee will be collected.
(2) Proceeding supplemental to execution 20.00
(3) Confession of judgment 15.00
(4) Taking a deposition 5.00
(5) Execution 15.00
(6) Notice of resumption of former name 5.00
(7) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) $1.00
(8) Bond, taking justification or approving 5.00
(9) Certificate, under seal 2.00
(10) Exemplification of records 5.00
(11) Recording or docketing (including indexing) any document
— first page 4.00
— each additional page or fraction thereof .... .25
(12) Preparation of copies
— first page 1.00
— each additional page or fraction thereof .... .25
(13) Preparation and docketing of transcript of judgment . 5.00
(14) Substitution of trustee in deed of trust 5.00
(15) Execution of passport application — the amount allowed by federal law
(16) Repealed by Session Laws 1989, c. 783, s. 2.
(17) Criminal record search except if search is requested by an agency of the State or any of its political subdivisions or by an agency of the United States or by a petitioner in a proceeding under Article 2 of General Statutes Chapter 20 .... 5.00
(18) Filing the affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 .... 4.00
(19) Repealed by Session Laws 1989, c. 783, s. 3.

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged. The Director of the Administrative Office of the courts shall issue guidelines pursuant to G.S. 7A-343(3) to be followed in administering this subsection. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1; 1983, c. 713, s. 18; 1985, c. 475, ss. 2, 3; c. 481, ss. 6-8; c. 511, s. 2; 1989, c. 783, ss. 2-4; 1997-114, s. 1.)

Local Modification. — Columbus, Durham, and Rockingham Counties by 1997-443, s. 18.22(a).

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, in subdivision (a)(1) substituted "$30.00" for "$25.00", and substituted the present last three sentences for "Plus if the property is sold pursuant to the power of sale, an additional sum of thirty cents (30¢) per one hundred dollars ($100.00), or major fraction thereof, of the final sale price shall be collected. In no case shall the additional sum exceed two hundred dollars ($200.00)".

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

CASE NOTES

Unless an expert witness is subpoenaed, the witness' fees are not generally recognized as costs.

Trial court properly allowed expert witness fees under subsection (d) since defendant deposed the experts pursuant to a subpoena. Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995).

Witness Must Be Subpoenaed. — While the trial court may award or decline to award witness fees as an exercise of discretion, it may not decline to exercise its discretion by making this determination as a matter of law; this rule does not apply where the witness was not subpoenaed. Holtman v. Reese, 119 N.C. App. 747, 460 S.E.2d 338 (1995).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
State Auditor, Department of the	1
Treasurer, Department of the State	1
Superintendent of Public Instruction	1

Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Environment and Natural Resources, Department of	1
Revenue, Department of	1
Health and Human Services, Department of	1
Commission for the Blind	1
Transportation, Department of	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
State Personnel Commission	1
Office of State Personnel	1
Office of Administrative Hearings	2
Community Colleges, Department of	38
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
Cultural Resources, Department of	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell University	25
Federal, Out-of-State and Foreign Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1

Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278; 1985 (Reg. Sess., 1986), c. 1022, s. 2; 1987, c. 877, s. 1; 1989, c. 727, s. 218(1); 1993, c. 257, s. 19; 1995, c. 166, s. 1; c. 509, s. 4; 1997-443, s. 11A.7.)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Environment and Natural Resources, Department of" for "Board of Environment, Health, and Natural Resources", "Health and Human Services, Department of" for "Board of Human Resources", "Transportation, Department of" for "Board of Transportation", and "Cultural Resources, Department of" for "Department of Cultural Resources".

§ 7A-346.1. Dispute Settlement Center Reports.

Editor's Note. —

Session Laws 1997, c. 443, s. 18.3, provides that all local dispute settlement centers currently receiving State funds shall report annually to the Judicial Department on the program's funding and activities, to be provided to the House and Senate Appropriations Committees, and also provides for certain funding ratios.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Legal Periodicals. — For article, "Mediation of Industrial Commission Cases," see 17 Campbell L. Rev. 395 (1995).

§ 7A-347. Assistants for administrative and victim and witness services.

Assistant for administrative and victim and witness services positions are established under the district attorneys' offices. Each prosecutorial district is allocated at least one assistant for administrative and victim and witness services to be employed by the district attorney. The Administrative Office of the Courts shall allocate additional assistants to prosecutorial districts on the basis of need and within available appropriations. Each district attorney may also use any volunteer or other personnel to assist the assistant. The assistant is responsible for coordinating efforts of the law-enforcement and judicial systems to assure that each victim and witness is provided fair treatment under Article 45 of Chapter 15A, Fair Treatment for Victims and Witnesses and shall also provide administrative and legal support to the district attorney's office. (1985 (Reg. Sess., 1986), c. 998, s. 2; 1997-443, s. 18.7(c).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, rewrote this section.

§ 7A-348. Training and supervision of assistants for administrative and victim and witness services.

Pursuant to the provisions of G.S. 7A-413, the Conference of District Attorneys shall:

(1) Assist in establishing uniform statewide training for assistants for administrative and victim and witness services;

(2) Assist in the implementation and supervision of this program; and

(3) With the Director of the Administrative Office of the Courts, report annually to the Joint Legislative Commission on Governmental Operations on the implementation and effectiveness of this act, beginning on or before February 1, 1987. (1985 (Reg. Sess., 1986), c. 998, s. 2; 1997-443, s. 18.7(d).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 18.7(f), provides that the Administrative Office of the Courts and the Conference of District Attorneys shall provide for persons serving as victim and witness assistants and as legal assistants on June 30, 1997, to be trained as assistants for administrative and victim and witness services by July 1, 1998. Prior to that time the district attorney may temporarily assign a victim and witness assistant to perform duties normally performed by a legal assistant and vice versa.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, substituted "assistants for administrative and victim and witness services" for "victim and witness assistants" in the catchline, and for "the victim and witness assistants" in subdivision (1).

ARTICLE 30.

Judicial Standards Commission.

§ 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist of: one Court of Appeals judge, one superior court judge, and one district court judge, each appointed by the Chief Justice of the Supreme Court; two members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and two citizens who are not judges, active or retired, nor members of the State Bar, appointed by the Governor. The Court of Appeals judge shall act as chair of the Commission.

(b) Terms of Commission members shall be for six years, except that, to achieve overlapping of terms, one of the judges, one of the practicing members of the State Bar, and one of the citizens shall be appointed initially for a term of only three years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for his appointment, he ceases to be a member. Vacancies are filled in the same manner as the original appointment, for the remainder of the term. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place he takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. In a particular case, if a member disqualifies himself, or is successfully challenged for cause, his seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of his term only to participate until the conclusion of a formal proceeding begun before expiration of his term. Such participation shall not prevent his successor from taking office, but the successor may not participate in the proceeding for which his predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office. (1971, c. 590, s. 1; 1973, c. 50; 1975, c. 956, s. 13; 1997-72, s. 1.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "chair" for "chairman" following "shall act as" in subsection (a).

CASE NOTES

Function of Commission. — The Judicial Standards Commission's function is to investigate complaints against sitting judges and candidates for judicial office and to recommend to the Supreme Court what, if any, disciplinary action should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

Powers of Commission. — The Judicial Standards Commission is empowered by § 7A-377 to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

§ 7A-376. Grounds for censure or removal.

CASE NOTES

I. General Consideration.
III. Conduct Prejudicial to Administration of Justice.
V. Censure and Removal.

I. GENERAL CONSIDERATION.

Grounds for suspension or removal of a magistrate are the same as for a judge of the General Court of Justice. In re Kiser, — N.C. App. —, 484 S.E.2d 441 (1997).

Cited in In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

III. CONDUCT PREJUDICIAL TO ADMINISTRATION OF JUSTICE.

Judge was censured for conduct prejudicial to the administration of justice where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

V. CENSURE AND REMOVAL.

Censure Proper. —
Where judge requested that parties, including district attorney and defendant, meet and indicated his desire to have defendant served with arrest warrant immediately and proposed to conduct bond proceedings himself, he was properly censured for ex parte communications and voluntary injection of himself into a case not properly before him. In re Martin, 345 N.C. 167, 478 S.E.2d 186 (1996).

Censure Not Proper. — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission is authorized to issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, and to prescribe its own rules of procedure. No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law. Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential, except as provided herein. After the preliminary investigation is completed, and if the Commission concludes that formal proceedings should be instituted, the notice and complaint filed by the Commission, along with the answer and all other pleadings, are not confidential. Formal hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) The chair of the Commission is authorized to employ an executive secretary to assist the Commission in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases, the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. (1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2; 1997-72, s. 2.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, substituted "The chair of the Commission is authorized to employ an executive secretary to assist the commission" for "The Commission is authorized to employ an executive secretary to assist it" at the beginning of subsection (b).

CASE NOTES

Powers of Commission. — The Judicial Standards Commission is empowered by this section to investigate complaints, compel the attendance of witnesses and the production of evidence, conduct hearings which afford due process of law, and make recommendations to the Supreme Court about what disciplinary action, if any, should be taken. In re Renfer, 345 N.C. 632, 482 S.E.2d 540 (1997).

Judge was censured for conduct prejudicial to the administration of justice where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

Cited in In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996); In re Martin, 345 N.C. 167, 478 S.E.2d 186 (1996).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

CASE NOTES

I. General Consideration.
II. Appointment of Counsel.
III. Appointment of Experts.

I. GENERAL CONSIDERATION.

Applied in State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (1995).

Cited in State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Fullwood, 343 N.C. 725, 472 S.E.2d 883 (1996); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

II. APPOINTMENT OF COUNSEL.

Once defendant accepted the services of properly retained counsel and consented to the withdrawal of appointed counsel, he was no longer indigent within the meaning of subsection (a). Retained counsel's general notice of appearance pursuant to § 15A-143 meant counsel was required to represent him in the case through the entry of final judgment. State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996), cert. denied, — U.S. —, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996).

III. APPOINTMENT OF EXPERTS.

When Right to Investigator Arises. —

Section 7A-454 and this section require that a private investigator be provided upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help more likely than not the defendant will not receive a fair trial. State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997).

To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his case. State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996).

Same — Investigator. —

The prohibition of the surveillance of rape victim by a private investigator did not impose an arbitrary barrier, nor a violation of defendant's right to equal protection of the law. State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997).

Indigent defendant was not prejudiced by the denial of his request for funds to hire a psychiatrist or a psychologist, a forensic pathologist, a firearms and ballistics expert, and a behavioral pharmacologist. State v. Sokolowski, 344 N.C. 428, 474 S.E.2d 333 (1996).

§ 7A-450.4. Exemptions.

General Statutes 7A-450.1, 7A-450.2 and 7A-450.3 do not authorize the court to require the Department of Health and Human Services or any county Department of Social Services to reimburse the State for fees. (1983, c. 726, s. 1; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
(4) A hearing for revocation of probation;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.
(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;
(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23;
(15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.
(16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
(4) A probable cause hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

(c) In any capital case, an indigent defendant who is under a sentence of death may apply to the superior court of the district where the defendant was indicted for the appointment of counsel to represent the defendant in preparing, filing, and litigating a motion for appropriate relief. The application for the appointment of such postconviction counsel may be made prior to completion of review on direct appeal and shall be made no later than 10 days from the latest of the following:

(1) The mandate has been issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
(2) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina; or
(3) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina, but subsequently left the defendant's death sentence undisturbed.

If there is not a criminal or mixed session of superior court scheduled for that district, the application must be made no later than 10 days from the beginning of the next criminal or mixed session of superior court in the district. Upon application, supported by the defendant's affidavit, the superior court shall enter an order appointing two counsel if the court finds that the defendant is indigent and desires counsel. The defendant does not have a right to be present at the time of appointment of counsel, and the appointment need not be made in open court. If the defendant was previously adjudicated an indigent for purposes of trial or direct appeal, the defendant shall be presumed indigent for purposes of this subsection.

(d) The appointment of counsel as provided in subsection (c) of this section and the procedure for compensation shall comply with the Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants pursuant to G.S. 7A-459. The court may appoint counsel recruited by the Appellate Defender pursuant to G.S. 7A-486.3(5).

(e) No counsel appointed pursuant to subsection (c) of this section shall have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made unless the defendant expressly requests continued representation and understandingly waives future allegations of ineffective assistance of counsel. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4; 1985, c. 509, s. 1; c. 589, s. 3; 1987, c. 550, s. 16; 1995, c. 462, s. 3; 1995 (Reg. Sess., 1996), c. 719, s. 7.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added subsections (c), (d), and (e).

CASE NOTES

I. General Consideration.
II. Right to Counsel in Particular Actions.

I. GENERAL CONSIDERATION.

Cited in Ashe v. Styles, 67 F.3d 46 (4th Cir. 1995).

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

Additional Counsel Not Required for Inextricably Intertwined Offenses. — Where indigent defendant had court appointed attorneys in felony murder case, defendant's contention that entry of judgment for armed robbery was improper because no counsel had been appointed for that charge was without merit as the offenses were inextricably intertwined such that representation for one was tantamount to representation for the other. State v. Quick, — N.C. App. —, 483 S.E.2d 721 (1997).

§ 7A-454. Supporting services.

CASE NOTES

When Private Investigators or Expert Assistance Will Be Provided, etc. —
State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997).

§ 7A-455. Partial indigency; liens; acquittals.

CASE NOTES

Cited in State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996).

§ 7A-457. Waiver of counsel; pleas of guilty.

CASE NOTES

I. General Consideration.
II. Waiver of Counsel.
  B. Requirement of Writing.

I. GENERAL CONSIDERATION.

Cited in State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996).

II. WAIVER OF COUNSEL.

B. Requirement of Writing.

Lack of Written Waiver. — The fact that there is no written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the waiver. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996).

§ 7A-458. Counsel fees.

CASE NOTES

Amount Discretionary. — Amount of an award of indigent counsel fees is discretionary with the trial court. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation.

(a) The following counties of the State are organized into the defender districts listed below and in each of those defender districts an office of public defender is established:

Defender District	*Counties*
3A	Pitt
3B	Carteret
12	Cumberland
14	Durham
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
26	Mecklenburg
27A	Gaston
28	Buncombe

Provided that the effective date of the establishment of the office of public defender in Defender District 16B shall be the date that a superior court judge for Superior Court District 16B, other than the judge holding the judgeship for that district established by Chapter 509, Session Laws of 1987, takes office.

(a1) The public defender for each of the above defender districts shall represent indigents and otherwise perform all other duties of a public defender in the district and superior courts of the counties included in his defender district.

(b) The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office.

In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender, assistant public defender, justice or judge of the General Court of Justice, or clerk of superior court. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72; 1983 (Reg. Sess., 1984), c. 1034, s. 94; 1987, c. 738, s. 35; 1987 (Reg. Sess., 1988), c. 1056, ss. 8, 9; 1989 (Reg. Sess., 1990), c. 1066, s. 127(b); 1996, 2nd Ex. Sess., c. 18, s. 28.25.)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective July 1, 1996, added "assistant public defender, justice or judge of the General Court of Justice, or clerk of superior court" at the end of subsection (b).

§ 7A-466. Term of defender; selection; removal.

(a) Except as provided in subsection (b) of this section, the term of office of each public defender is for four years, beginning on the date specified in subsection (b) or (c) of this section, and quadrennially thereafter.

(b) The public defender for each of the judicial districts listed below, as constituted on December 31, 1988, who is in office on that date, shall become the public defender for the defender district listed opposite that judicial district. The term of each such defender shall end on the date indicated and a new term shall begin on the following day.

Judicial District as of 12/31/88	*Defender District*	*Term Ends*
12	12	December 31, 1989
15B	15B	May 31, 1991
18	18	June 30, 1991
26	26	June 30, 1991
27A	27A	June 30, 1991
28	28	June 30, 1989.

(c) The terms of the public defenders for Defender Districts 3A, 3B, and 16A shall begin on January 1, 1989. The term of the public defender for Defender District 16B shall begin upon the appointment of the initial public defender for that district. The term of the public defender for Defender District 14 shall begin on July 1, 1990.

(d) Except in Defender District 16B, for each new term beginning on or after January 1, 1989, and to fill any vacancy, the public defender for a defender district shall be appointed from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 which includes the county or counties of the defender district for which the public defender is being appointed.

(e) In Defender District 16B, for each new term beginning on or after January 1, 1989, and to fill any vacancy, the public defender for a defender district shall be appointed from a list of not less than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The appointment shall be made by the senior resident superior court judge of Superior Court District 16B.

(f) A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess., c. 1284, s. 2; 1981 (Reg. Sess., 1982), c. 1282, s. 73; 1985, c. 698, s. 22.1; 1987 (Reg. Sess., 1988), c. 1056, s. 10; 1989 (Reg. Sess., 1990), c. 1066, s. 127(c); c. 1074, s. 16(b); 1997-175, s. 1.)

Effect of Amendments. — The 1997 amendment, effective June 12, 1997, in the last sentence of subsection (e), added "senior" preceding "resident superior" and deleted "other than the senior resident superior court judge" from the end.

ARTICLE 37A.

Access to Civil Justice Act.

§ 7A-474.3. Eligible activities and limitations.

(a) Eligible Activities. Funds appropriated under this Article shall be used only for the following purposes:

(1) To provide legal assistance to eligible clients;
(2) To provide education to eligible clients regarding their rights and duties under the law;
(3) To involve the private bar in the representation of eligible clients pursuant to this Article.

(b) Eligible Cases. Legal assistance shall be provided to eligible clients under this Article only in the following types of cases:

(1) Family violence or spouse abuse;
(2) Assistance for the disabled in obtaining federal Social Security benefits;
(3) Representation of eligible farmers faced with the potential of farm foreclosure;
(4) Representation of eligible clients over the age of 60 regarding the following matters:
    a. Wills and estates;
    b. Safe and sanitary housing;

  c. Pensions and retirement rights;
  d. Social Security and Medicare rights;
  e. Access to health care;
  f. Food and nutrition; and
  g. Transportation.

(5) Representation of eligible clients designed to enable them to obtain the necessary skills and means to obtain meaningful employment at a decent wage and reduce the public welfare rolls; and

(6) Representation of eligible clients under the age of 21 or eligible families with legal problems affecting persons under the age of 21 regarding the following matters:
  a. Financial support and custody of children;
  b. Child care;
  c. Child abuse or neglect;
  d. Safe and sanitary housing;
  e. Food and nutrition; and
  f. Access to health care.

(c) Limitations. No funds appropriated under this Article shall be used for any of the following purposes:

(1) To provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion;

(2) To provide legal assistance with respect to any criminal proceeding;

(3) To provide legal assistance to any agricultural employee or migrant farmworker employed in North Carolina with regard to the terms of the worker's employment, including conditions relating to housing;

(4) To provide legal assistance to any prisoner within the North Carolina Department of Correction with regard to the terms of that person's incarceration; or

(5) To provide legal assistance to persons with mental handicaps residing in State institutions with regard to the terms and conditions of the treatment or services provided to them by the State. (1989, c. 795, s. 25; 1997-506, s. 29.)

Effect of Amendments. — The 1997 amendment, effective September 16, 1997, substituted "child care" for "day care" in subdivision (b)(6).

ARTICLE 39.

Guardian Ad Litem Program.

§ 7A-489. Office of Guardian Ad Litem Services established.

Editor's Note. — Session Laws 1997-443, s. 18.19, provides that attorneys providing legal services for the Guardian Ad Litem program shall bill the Judicial Department within 60 days after the end of each quarter of the fiscal year in order to be reimbursed for those services.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

ARTICLE 39A.

Custody and Visitation Mediation Program.

§ 7A-494. Custody and Visitation Mediation Program established.

Legal Periodicals. — For comment, "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40A.

North Carolina Courts Commission.

§ 7A-506. Creation; members; terms; qualifications; vacancies.

(a) The North Carolina Courts Commission is created. Effective July 1, 1993, it shall consist of 28 members, seven to be appointed by the Governor, seven to be appointed by the Speaker of the House of Representatives, seven to be appointed by the President Pro Tempore of the Senate, and seven to be appointed by the Chief Justice of the Supreme Court.

(b) Of the appointees of the Chief Justice of the Supreme Court, one shall be a Justice of the Supreme Court, one shall be a Judge of the Court of Appeals, two shall be judges of superior court, two shall be district court judges, and one shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

(c) Of the seven appointees of the Governor, one shall be a district attorney, one shall be a practicing attorney, one shall be a clerk of superior court, at least three shall be members of the General Assembly, at least two shall not be attorneys, and of the nonattorneys, one shall be a public member who is not an officer or employee of the Judicial Department.

(d) Of the seven appointees of the Speaker of the House, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, at least two shall not be attorneys, and of the non-attorneys, one shall be a public member who is not an officer or employee of the Judicial Department.

(e) Of the seven appointees of the President Pro Tempore of the Senate, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, at least one shall be a magistrate, and one shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

(f) Of the initial appointments of each appointing authority, three shall be appointed for four-year terms to begin July 1, 1993, and three shall be appointed for two-year terms to begin July 1, 1993. The two public members appointed by the Governor and the Speaker of the House of Representatives shall be appointed for four-year terms to begin July 1, 1997. The two public members appointed by the Chief Justice and the President Pro Tempore of the Senate shall be appointed for two-year terms to begin July 1, 1997. Successors shall be appointed for four-year terms.

(g) A vacancy in membership shall be filled for the remainder of the unexpired term by the appointing authority who made the original appointment. A member whose term expires may be reappointed. (1979, c. 1077, s. 1; 1981, c. 847; 1981 (Reg. Sess., 1982), c. 1253, s. 4; 1983, c. 181, ss. 1, 2; c. 774, s. 2; 1991, c. 739, s. 7; 1993, c. 438, s. 1; 1997-82, s. 1.)

Effect of Amendments. — The 1997 amendment, effective May 22, 1997, substituted "seven" for "six" throughout the section; in subsection (a) substituted "28 members" for "24 members"; in subsections (b) and (d) added language beginning "and one shall be a" and ending "of the Judicial Department" to the end; in subsections (c) and (d) substituted "two" for "one" and added "and of the nonattorneys, one shall be a public member who is not an officer or employee of the Judicial Department"; in subsection (f) added the second and third sentences; and made related changes.

§ 7A-507. Ex officio members.

The following additional members shall serve ex officio: the Administrative Officer of the Courts; a representative of the N. C. State Bar appointed by the Council thereof; and a representative of the N. C. Bar Association appointed by the Board of Governors thereof. The Administrative Officer of the Courts has no vote. (1979, c. 1077, s. 1; 1997-82, s. 2.)

Effect of Amendments. — The 1997 amendment, effective May 22, 1997, substituted "The Administrative Officer of the Courts has no vote" for "Ex officio members have no vote" at the end.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41.

Purpose; Definitions.

§ 7A-516. Purpose.

CASE NOTES

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 7A-517. Definitions.

Unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. — Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; or

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; or

b1. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; or

c. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178 and 14-179; preparation of obscene photographs, slides or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties; or

d. Creates or allows to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aftercare. — The supervision of a juvenile who has been returned to the community on conditional release after having been committed to the Division of Youth Services.

(3) Administrator for Juvenile Services. — The person who is responsible for the planning, organization, and administration of a statewide system of juvenile intake, probation, and aftercare services.

(4) Director of the Division of Youth Services. — The person responsible for the supervision of the administration of institutional and detention services.

(5) Caretaker. — Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare

of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, or any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter 50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of Chapter 7A of the General Statutes only.

(6) Chief Court Counselor. — The person responsible for administration and supervision of juvenile intake, probation, and aftercare in each judicial district, operating under the supervision of the Administrator for Juvenile Services.

(7) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(8) Community-based program. — A program providing nonresidential or residential treatment to a juvenile in the community where his family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(9) Court. — The District Court Division of the General Court of Justice.

(10) Court counselor. — A person responsible for probation and aftercare services to juveniles on probation or on conditional release from the Division of Youth Services under the supervision of the chief court counselor.

(11) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

(12) Delinquent juvenile. — Any juvenile less than 16 years of age who has committed a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.

(13) Dependent Juvenile. — A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

(14) Detention. — The confinement of a juvenile pursuant to an order for secure custody pending an adjudicatory or dispositional hearing or admission to a placement with the Division of Youth Services.

(15) Detention home. — An authorized facility providing secure custody for juveniles.

(15a) District. — Any district court district as established by G.S. 7A-133.

(16) Holdover facility. — A place in a jail which has been approved by the Department of Health and Human Ser-

vices as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.

(16.1) In loco parentis. — A person acting in loco parentis means one, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(17) Intake counselor. — A person who screens a petition alleging that a juvenile is delinquent or undisciplined to determine whether the petition should be filed.

(18) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee or runaway, to his home state.

(19) Judge. — Any district court judge.

(19a) Judicial district. — Any district court district as established by G.S. 7A-133.

(20) Juvenile. — Any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not reached his sixteenth birthday and is not married, emancipated, or a member of the armed forces. A juvenile who is married, emancipated, or a member of the armed forces, shall be prosecuted as an adult for the commission of a criminal offense. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

(21) Neglected Juvenile. — A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

(22) Petitioner. — The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(23) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a court counselor, and may be returned to the court for violation of those conditions during the period of probation.

(24) Prosecutor. — The assistant district attorney assigned by the district attorney to juvenile proceedings.

(25) Protective supervision. — The status of a juvenile who has been adjudicated delinquent or undisciplined and is under the supervision of a court counselor.

(25a) Reasonable efforts. — The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.

(26) Regional detention home. — A state-supported and administered regional facility providing detention care.

(26a) Safe home. — A home in which the child is not at substantial risk of physical or emotional abuse or neglect.

(27) Shelter care. — The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(28) Undisciplined juvenile. — A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.

(29) Director of the department of social services. — The director of the county department of social services in the county in which the juvenile resides or is found, or his representative as authorized in G.S. 108A-14.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695; 1987 (Reg. Sess., 1988), c. 1037, ss. 36, 37; 1989 (Reg. Sess., 1990), c. 815, s. 1; 1991, c. 258, s. 3; c. 273, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 3; 1993, c. 324, s. 1; c. 516, ss. 1-3; 1997-113, s. 1; 1997-390, s. 3; 1997-390, s. 3.2; 1997-443, s. 11A.118(a); 1997-506, s. 30.)

Editor's Note. —

Subdivision (25b), as added by 1997-390, s. 3, was redesignated as subdivision (26a) at the direction of the Revisor of Statutes.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-113, s. 1, effective October 1, 1997 and applicable to adjudications of dependency made on or after that date, substituted "the juvenile has no parent" for "he has no parent" and substituted "guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement" for "guardian, or custodian, due to physical or mental incapacity and the absence of an appropriate alternative child care arrangement, is unable to provide for the care or supervision" in subdivision (13).

Session Laws 1997-390, ss. 3 and 3.2, effective October 1, 1997, and applicable to actions commenced on and after that date, added subdivisions (25a) and (26a); and in subdivision (21) deleted "died as a result of abuse or neglect or lives in a home where another juvenile has" preceding "been subjected to", and substituted "abuse or neglect" for "sexual abuse or severe physical abuse."

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

Session Laws 1997-506, s. 30, effective September 16, 1997, substituted "child care facility" for "child day care home or" in the third sentence of subsection (5).

Legal Periodicals. —

For comment, "Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process," see 73 N.C.L. Rev. 2063 (1995).

For note, "Municipal Liability for Negligent Inspections in Sinning v. Clark — A 'Hollow' Victory for the Public Duty Doctrine," see 18 Campbell L. Rev. 241 (1996).

For note, "Holding a Child in Contempt," see 46 Duke L.J. 353 (1996).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudicating a juvenile as neglected. In re Mitchell, — N.C. App. —, 485 S.E.2d 623 (1997).

Applied in Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Quoted in State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Stated in State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996).

Cited in Sinning v. Clark, 119 N.C. App. 515, 459 S.E.2d 71 (1995).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The citation to the Opinions of Attorney General annotated under this section in the main volume should be to 48 N.C.A.G. 35 (1978).*

ARTICLE 42.

Jurisdiction.

§ 7A-523. Jurisdiction.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect. For purposes of determining jurisdiction, with the exception of [subsection] (c) below, the age of the juvenile either at the time of the alleged offense or when the conditions causing the juvenile to be abused, neglected, or dependent arose, governs. There is no minimum age for juveniles alleged to be abused, dependent or neglected. For juveniles alleged to be delinquent or undisciplined, the minimum age is six years of age.

The court also has exclusive original jurisdiction of the following proceedings:

(1) Proceedings under the Interstate Compact on Juveniles and the Interstate Parole and Probation Hearing Procedures for Juveniles;

(2) Proceedings to determine whether a juvenile who is on conditional release and under the aftercare supervision of the court counselor has violated the terms of the juvenile's conditional release established by the Division of Youth Services;

(3) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when the juvenile's parent, guardian, legal custodian, or other person standing in loco parentis refuses to consent for treatment to be rendered;

(4) Proceedings to determine whether a juvenile should be emancipated;

(5) Proceedings to terminate parental rights;

(6) Proceedings to review the placement of a juvenile in foster care pursuant to an agreement between the juvenile's parents or guardian and a county department of social services;

(7) Proceedings in which a person is alleged to have obstructed or interfered with an investigation required by G.S. 7A-544.

(8) Proceedings involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes.

(b) The court shall have jurisdiction over the parent of a juvenile who has been adjudicated delinquent, undisciplined, abused, neglected or dependent, as provided by G.S. 7A-564, provided the parent has been properly served with notice pursuant to G.S. 7A-564.

(c) When the court has not obtained jurisdiction over a juvenile before the juvenile reaches the age of eighteen, for a felony and any related misdemeanors the juvenile allegedly committed on or after the juvenile's thirteenth birthday and prior to the juvenile's sixteenth birthday, the court has jurisdiction for the sole purpose of conducting proceedings pursuant to Article 49 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition. (1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2; 1995, c. 328, s. 3; c. 462, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 23.2(c).)

Editor's Note. — The bracketed word "subsection" was inserted in subsection (a) at the direction of the Revisor of Statutes.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, inserted "with the exception of (c) below" in the first paragraph of subsection (a); substituted "the juvenile's" for "his" in subdivisions (a)(1) and (a)(2); and added subsection (c).

CASE NOTES

Jurisdiction over Juveniles. — Where defendant was twelve or thirteen at the time he committed the felony of crime against nature, but had subsequently become an adult, the district court had exclusive original jurisdiction, because for the purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

§ 7A-524. Retention of jurisdiction.

When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of eighteen. When delinquency proceedings cannot be concluded before the juvenile reaches the age of eighteen, the court retains jurisdiction for the sole purpose of conducting proceedings pursuant to Article 49 of this Chapter and either transferring the case to superior court for trial as an adult or dismissing the petition. Any juvenile who is under the jurisdiction of the court and commits a criminal offense after the juvenile's sixteenth birthday is subject to prosecution as an adult. Any juvenile who is transferred to and sentenced by the superior court for a felony offense shall be prosecuted as an adult for all other crimes alleged to have been committed by the juvenile while the juvenile is under the active supervision of the superior court. Nothing herein shall be construed to divest the court of jurisdiction in abuse, neglect, or dependency proceedings. (1979, c. 815, s. 1; 1981, c. 469, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 23.2(d).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, and applicable to all cases pending on that date, substituted "the juvenile reaches the age of eighteen" for "he reaches his eighteenth birthday" in the first sentence, added the second sentence, and made stylistic changes.

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-542. Protective services.

The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life.

The provisions of this Article shall also apply to child care facilities as defined in G.S. 110-86. (1979, c. 815, s. 1; 1981, c. 359, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 1; 1997-506, s. 31.)

Effect of Amendments. — The 1997 amendment, effective September 16, 1997, substituted "child care facilities" for "child day care facilities and child day care homes".

CASE NOTES

Refusal to Permit Evaluation. — Respondent's refusal to permit the Child Mental Health Evaluation of his two sons based, in part, upon his religious beliefs was not constitutionally protected and did not afford him a lawful excuse for his interference with the investigation by the Department of Social Services. In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

Family Privacy and Integrity. — State statutes granting authority to the Department of Social Services to prevent the abuse or neglect of children take into account families' fundamental interest in family privacy and integrity. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Quoted in Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

OPINIONS OF ATTORNEY GENERAL

Protection of Minor's Rights. — Although a minor cannot obtain legal representation without the consent of the legally responsible person, the rights of the child can be adequately protected. The Department of Social Services can conduct an investigation of the legally responsible person pursuant to § 7A-542 et seq., the guardian ad litem program can provide additional support for abused, neglected, or dependent juveniles, including legal support and, a minor receives representation for the commitment proceedings by virtue of §§ 122C-224.1 and 122C-270. See opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (December 20, 1995).

§ 7A-543. Duty to report child abuse, neglect, dependency, or death due to maltreatment.

Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7A-517, or has died as the result of maltreatment, shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the Department's investigation of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of child sexual abuse in a child care facility, the Director shall notify the State Bureau of Investigation within 24 hours or on the next work day. If child sexual abuse in a child care facility is not alleged in the initial report, but during the course of the investigation there is reason to suspect that child sexual abuse has occurred, the Director shall immediately notify the State Bureau of Investigation. Upon notification that child sexual abuse may have occurred in a child care facility, the State Bureau of Investigation may form a task force to investigate the report. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 2; 1993, c. 516, s. 4; 1997-506, s. 32.)

Effect of Amendments. — The 1997 amendment, effective September 16, 1997, substituted "child care facility" for "day care facility or day care home" three times in the second paragraph.

Legal Periodicals. — For comment, "Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process," see 73 N.C.L. Rev. 2063 (1995).

CASE NOTES

Stated in State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996).

Cited in Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996); State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997).

§ 7A-544. Investigation by Director; access to confidential information; notification of person making the report.

When a report of abuse, neglect, or dependency is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. When the report alleges abuse, the Director shall immediately, but no later than 24 hours after receipt of the report, initiate the investigation. When the report alleges neglect or dependency, the Director shall initiate the investigation within 72 hours following receipt of the report. The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services, including the identity of the reporter, shall be held in strictest confidence by the Department.

When a report of suspected abuse, neglect, or dependency of a juvenile is received, the Director of the Department of Social Services shall immediately ascertain if other juveniles remain in the home, and, if so, initiate an investigation in order to determine whether they require protective services or whether immediate removal of the juveniles from the home is necessary for their protection.

If the investigation indicates that abuse, neglect, or dependency has occurred, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this Chapter.

In performing any duties related to the investigation of the complaint or the provision or arrangement for protective services, the Director may consult with any public or private agencies or individuals, including the available State or local law-enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse, neglect, or dependency when requested by the Director. The Director or the Director's representative may make a written demand for any information or reports, whether or not confidential, that may in the Director's opinion be relevant to the investigation of or the provision for protective services. Upon the Director's or the Director's representative's request and unless protected by the attorney-client privilege, any public or private agency or individual shall provide access to and copies of this confidential information and these records to the extent permitted by federal law and regulations. If a custodian of criminal investigative information or records believes that release of the information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such an action, the custodian of the records shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this paragraph shall be set down for immediate hearing, and subsequent proceedings in the actions shall be accorded priority by the trial and appellate courts.

Within five working days after receipt of the report of abuse, neglect, or dependency, the Director shall give written notice to the person making the report, unless requested by that person not to give notice, as to whether the report was accepted for investigation and whether the report was referred to the appropriate State or local law enforcement agency.

Within five working days after completion of the protective services investigation, the Director shall give subsequent written notice to the person making the report, unless requested by that person not to give notice, as to whether there is a finding of abuse, neglect, or dependency, whether the county Department of Social Services is taking action to protect the juvenile, and what action it is taking, including whether or not a petition was filed. The person making the report shall be informed of procedures necessary to request a review by the prosecutor of the Director's decision not to file a petition. A request for review by the prosecutor shall be made within five working days of receipt of the second notification. The second notification shall include notice that, if the person making the report is not satisfied with the Director's decision, he may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive the person's right to this notification and no notification is required if the person making the report does not identify himself to the Director. (1979, c. 815, s. 1; 1985, c. 205; 1991, c. 593, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 3; 1993, c. 516, s. 5; 1995, c. 411, s. 1; 1997-390, s. 3.1.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to actions commenced on and after that date, substituted "suspected abuse, neglect, or dependency of a juvenile" for "a juvenile's death as a result of suspected maltreatment" in the second paragraph.

Legal Periodicals. —

For comment, "Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process," see 73 N.C.L. Rev. 2063 (1995).

For note, "Municipal Liability for Negligent Inspections in Sinning v. Clark — A 'Hollow' Victory for the Public Duty Doctrine," see 18 Campbell L. Rev. 241 (1996).

CASE NOTES

Qualified Immunity for Department of Social Services Employees. — Employees of the Department of Social Services were entitled to qualified immunity in plaintiffs' action alleging a violation of plaintiffs' family privacy rights, where plaintiffs failed to establish that the employees acted outside of the authority granted them by this section, or so vigorously intruded into plaintiffs' family as to infringe their family privacy rights. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Family Privacy and Integrity. — State statutes granting authority to the Department of Social Services to prevent the abuse or neglect of children take into account families' fundamental interest in family privacy and integrity. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Department of Social Services employee did not act outside of the authority conferred on her by statute, or violate plaintiffs' rights to family privacy and integrity, by placing child in foster home or making telephone calls seeking information about child, after receiving reports that child was beaten by her father or otherwise abused. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Length of Investigation Did Not Violate Family's Privacy Rights. — Length of investigation by Department of Social Services Employee did not violate family's rights to privacy, where employee was required to extend his investigation beyond the allegations of the initial complaint alleging abuse by the many factors which suggested abuse may have occurred. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

Quoted in Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

Stated in State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996); In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

Cited in State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995).

§ 7A-544.1. Interference with investigation.

CASE NOTES

Refusal to Permit Evaluation. — Respondent's refusal to permit the Child Mental Health Evaluation of his two sons based, in part, upon his religious beliefs was not constitutionally protected and did not afford him a lawful excuse for his interference with the investigation by the Department of Social Services. In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996).

Cited in Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

§ 7A-547. Review by prosecutor.

CASE NOTES

When Right to Counsel Attaches. — Where a defendant is represented by counsel in civil abuse proceedings, defendant's Sixth Amendment right to counsel attaches upon the filing of the abuse petition, and any statement given without the defendant's attorney being present or without an express waiver of the right to counsel must be suppressed in a related criminal juvenile abuse proceeding. State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996).

§ 7A-548. Duty of Director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Health and Human Services and State Bureau of Investigation.

(a) If the Director finds evidence that a juvenile may have been abused as defined by G.S. 7A-517(1), the Director shall make an immediate oral and subsequent written report of the findings to the district attorney or the district attorney's designee and the appropriate local law enforcement agency within 48 hours after receipt of the report. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate and coordinate a criminal investigation with the protective services investigation being conducted by the county Department of Social Services. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate and may request the Director or the Director's designee to appear before a magistrate.

If the Director receives information that a juvenile may have been physically harmed in violation of any criminal statute by any person other than the juvenile's parent, guardian, custodian, or caretaker, the Director shall make an immediate oral and subsequent written report of that information to the district attorney or the district attorney's designee and to the appropriate local law enforcement agency within 48 hours after receipt of the information. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate a criminal investigation. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate.

If the report received pursuant to G.S. 7A-543 involves abuse or neglect of a juvenile in child care, the Director shall notify the Department of Health and Human Services within 24 hours or on the next working day of receipt of the report.

(a1) If the Director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7A-517 in a child care facility, the Director shall immediately so notify the Department of Health and Human Services and, in the case of child sexual abuse, the State Bureau of Investigation, in such a way as does not violate the law guaranteeing the confidentiality of the records of the Department of Social Services.

(a2) Upon completion of the investigation, the Director shall give the Department written notification of the results of the investigation required by G.S. 7A-544. Upon completion of an investigation of child sexual abuse in a child care facility, the Director shall also make written notification of the results of the investigation to the State Bureau of Investigation.

The Director of the Department of Social Services shall submit a report of alleged abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment to the central registry under the policies adopted by the Social Services Commission.

(b) Repealed by Session Laws 1991, (Reg. Sess. 1992), c. 923, s. 4, effective August 1, 1992. (1979, c. 815, s. 1; 1983, c. 199; 1985, c. 757, s. 156(s)-(u); 1991, c. 593, s. 2; 1991 (Reg. Sess., 1992), c. 923, s. 4; 1993, c. 516, s. 8; 1997-443, s. 11A.118(a); 1997-506, s. 33.)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-506, s. 33, effective September 16, 1997, in the last paragraph of subsection (a) substituted "child care" for "day care either in a day care facility or a day care home" ; in subsection (a1) substituted "child care facility the Director" for "day care either in a day care facility or day care home he"; and in subsection (a)(2) substituted "child care facility" for "day care facility or day care home".

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

When Right to Counsel Attaches. — Where a defendant is represented by counsel in civil abuse proceedings, defendant's Sixth Amendment right to counsel attaches upon the filing of the abuse petition, and any statement given without the defendant's attorney being present or without an express waiver of the right to counsel must be suppressed in a related criminal juvenile abuse proceeding. State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996).

Quoted in Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

Cited in State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997).

§ 7A-552. Central registry.

The Department of Health and Human Services shall maintain a central registry of abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Health and Human Services and shall be confidential, subject to policies adopted by the Social Services Commission providing for its use for study and research and for other appropriate disclosure. Data shall not be used at any hearing or court proceeding unless based upon a final judgment of a court of law. (1979, c. 815, s. 1; 1993, c. 516, s. 11; 1997-443, s. 11A.118(a).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

Quoted in Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

Article 45.

Venue; Petition; Summons.

§ 7A-559. Pleading and process.

CASE NOTES

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, — N.C. App. —, 485 S.E.2d 623 (1997).

§ 7A-561. Receipt of complaints; filing of petition.

CASE NOTES

Cited in Glen ex rel. Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918 (W.D.N.C. 1995).

§ 7A-564. Issuance of summons.

CASE NOTES

Jurisdiction. — The issuance and service of process is the means by which the court obtains jurisdiction; thus, where no summons was issued, the court acquired jurisdiction over neither the persons nor the subject matter of the action, and was without authority to enter order adjudging a juvenile as neglected. In re Mitchell, — N.C. App. —, 485 S.E.2d 623 (1997).

Article 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§ 7A-571. Taking a juvenile into temporary custody.

(a) Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for secure or nonsecure custody can be obtained. A juvenile may be taken into temporary custody under the following circumstances:

(1) A juvenile may be taken into temporary custody by a law-enforcement officer without a court order if grounds exist for the arrest of an adult in identical circumstances under G.S. 15A-401(b).

(2) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a court counselor if there are reasonable grounds to believe that the juvenile is an undisciplined juvenile.

(3) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a Department of Social Services worker if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order. If a Department of Social Services worker takes a juvenile into temporary custody under this subdivision, the worker may arrange for the placement, care, supervision, and transportation of the juvenile.

(4) A juvenile may be taken into custody without a court order by a law-enforcement officer, by a court counselor, by a member of the Black Mountain Center, Alcohol Rehabilitation Center and Juvenile Evaluation Center Joint Security Force established pursuant to G.S. 122C-421, or by personnel of the Division of Youth Services as designated by the Department of Health and Human Services if there are

reasonable grounds to believe the juvenile is an absconder from any State training school or approved detention facility.

(b) A law-enforcement officer may take physical custody of a juvenile who is 16 or 17 years of age without a court order, at the request of the juvenile's parent, guardian, or custodian if there are reasonable grounds to believe the juvenile is beyond the disciplinary control of the juvenile's parent, guardian, or custodian and has been absent from the home without permission for 48 consecutive hours. (1979, c. 815, s. 1; 1985, c. 408, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 1; 1994, Ex. Sess., c. 27, s. 2; 1995, c. 391, s. 1; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

Custody Did Not Violate Family Rights to Privacy and Integrity. — Department of Social Services employee did not act outside of the authority conferred on her by statute, or violate plaintiffs' rights to family privacy and integrity, by placing child in foster home or making telephone calls seeking information about child, after receiving reports that child was beaten by her father or otherwise abused. Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996).

§ 7A-576. Place of secure or nonsecure custody.

(a) A juvenile meeting the criteria set out in G.S. 7A-574, subsection (a), may be placed in nonsecure custody with the Department of Social Services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care or

(2) A facility operated by the Department of Social Services or

(3) Any other home or facility approved by the court and designated in the order.

In placing a juvenile in nonsecure custody under this section and under G.S. 7A-629 and G.S. 7A-651, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative. Prior to placement of a juvenile with a relative outside of this State, the placement must be in accordance with the Interstate Compact on the Placement of Children.

(b) A juvenile meeting the criteria set out in G.S. 7A-574(b) may be temporarily detained in an approved county detention home or a regional detention facility which shall be separate from any jail, lockup, prison, or other adult penal institution. It shall be unlawful for a county or any unit of government to operate a juvenile detention home unless the facility meets the standards promulgated by the Department of Health and Human Services.

(c), (d) Expired. (1979, c. 815, s. 1; 1983, c. 639, ss. 1, 2; 1997-390, s. 4; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-390, s. 4, effective October 1, 1997, and applicable to actions commenced on and after that date, added the second paragraph of subsection (a).

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 7A-577. Hearing to determine need for continued secure or nonsecure custody.

(a) No juvenile shall be held under a secure custody order for more than five calendar days or under a nonsecure custody order for more than seven calendar days, without a hearing on the merits or a hearing to determine the need for continued custody. A hearing on secure custody conducted under this subsection may not be continued or waived. A hearing on nonsecure custody conducted under this subsection may be continued for up to 10 business days with the consent of the juvenile's parent, guardian, or custodian, and, if appointed, the juvenile's guardian ad litem. In addition, the court may require the consent of additional parties or may schedule the hearing on nonsecure custody despite a party's consent to a continuance. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7A-573, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if such session precedes the expiration of the applicable time period set forth in this subsection: Provided, that if such session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) Any juvenile who is alleged to be delinquent shall be advised of the right to have legal representation as provided in G.S. 7A-584 if the juvenile appears without counsel at the hearing.

(c) At a hearing to determine the need for continued custody, the judge shall receive testimony and shall allow the juvenile, and the juvenile's parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The judge shall not be bound by the usual rules of evidence at such hearings.

(d) The judge shall be bound by criteria set forth in G.S. 7A-574 in determining whether continued custody is warranted.

(e) The judge shall impose the least restrictive interference with the liberty of a juvenile who is released from secure custody including:

(1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings; or

(2) Release into the care of a responsible person or organization; or

(3) Release conditioned on restrictions on activities, associations, residence or travel if reasonably related to securing the juvenile's presence in court; or

(4) Any other conditions reasonably related to securing the juvenile's presence in court.

(f) If the judge determines that the juvenile meets the criteria in G.S. 7A-574 and should continue in custody, the judge shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(g) Pending a hearing on the merits, further hearings to determine the need for continued secure custody shall be held at intervals of no more than seven calendar days. A subsequent hearing on continued nonsecure custody shall be held within seven business days, excluding Saturdays, Sundays, and legal holidays, of the initial hearing required in subsection (a) of this section and hearings thereafter shall be held at intervals of no more than 30 calendar days.

(g1) Hearings conducted under subsection (g) of this section may be waived as follows:

(1) In the case of a juvenile alleged to be delinquent, only with the consent of the juvenile, through counsel for the juvenile; and

(2) In the case of a juvenile alleged to be abused, neglected, or dependent, only with the consent of the juvenile's parent, guardian, or custodian, and, if appointed, the juvenile's guardian ad litem.

The court may require the consent of additional parties or schedule a hearing despite a party's consent to waiver.

(h) Any order authorizing the continued nonsecure custody of a juvenile who is alleged to be abused, neglected, or dependent shall include findings as to whether reasonable efforts have been made to prevent or eliminate the need for placement of the juvenile in custody and may provide for services or other efforts aimed at returning the juvenile promptly to a safe home. A finding that reasonable efforts have not been made shall not preclude the entry of an order authorizing continued nonsecure custody when the court finds that continued nonsecure custody is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable. If the court finds through written findings of fact that efforts to eliminate the need for placement of the juvenile in custody clearly would be futile or would be inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time, then the court shall specify in its order that reunification efforts are not required or order that reunification efforts cease.

(i) At each hearing to determine the need for continued nonsecure custody, the court shall:

(1) Inquire as to the identity and location of any missing parent. The court shall include findings as to the efforts undertaken to locate the missing parent and to serve that

parent. The order may provide for specific efforts aimed at determining the identity and location of any missing parent;

(2) Inquire as to whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order temporary placement of the juvenile with the relative. Prior to placement of a juvenile with a relative outside of this State, the placement must be in accordance with the Interstate Compact on the Placement of Children; and

(3) Inquire as to whether there are other juveniles remaining in the home from which the juvenile was removed and, if there are, inquire as to the specific findings of the investigation conducted under G.S. 7A-544 and any actions taken or services provided by the Director for the protection of the other juveniles. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1; 1997-390, ss. 5, 6.)

Effect of Amendments. — Session Laws 1997-390, ss. 5 and 6, effective October 1, 1997, and applicable to actions commenced on and after that date, in subsection (h) substituted "promptly to a safe home" for "home promptly", deleted "to prevent or eliminate the need for placement" preceding "shall not preclude", added the last sentence; and added subsection (i).

ARTICLE 47.

Basic Rights.

§ 7A-585. Appointment of guardian.

In any case when no parent appears in a hearing with the juvenile or when the judge finds it would be in the best interest of the juvenile, the judge may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school. The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile. The authority of the guardian shall continue until the guardianship is terminated by court order, until the juvenile is emancipated pursuant to Article 56 of this Chapter, or until the juvenile reaches the age of majority. (1979, c. 815, s. 1; 1997-390, s. 7.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to actions commenced on and after that date, substituted "the juvenile" for "him" in the third sentence, in the fourth sentence substituted "may" for "shall also have authority to", inserted the (i), (ii), and (iii) designations, substituted "enrollment in school" for "undergoing major surgery", added the fifth sentence, and in the last sentence inserted "court" and "of this Chapter."

§ 7A-586. Appointment and duties of guardian ad litem.

Editor's Note. —

Session Laws 1997-443, s. 18.19, provides that attorneys providing legal services for the Guardian Ad Litem program shall bill the Judicial Department within 60 days after the end of each quarter of the fiscal year in order to be reimbursed for those services.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

§ 7A-587. Parent's right to counsel.

CASE NOTES

When Right to Counsel Attaches. — Where a defendant is represented by counsel in civil abuse proceedings, defendant's Sixth Amendment right to counsel attaches upon the filing of the abuse petition, and any statement given without the defendant's attorney being present or without an express waiver of the right to counsel must be suppressed in a related criminal juvenile abuse proceeding. State v. Adams, 122 N.C. App. 538, 470 S.E.2d 838 (1996).

Cited in State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997).

ARTICLE 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§ 7A-595. Interrogation procedures.

CASE NOTES

There was no custodial interrogation where juvenile defendant was repeatedly told he was not under arrest and was free to leave at any time, and where he signed a statement wherein he stated that he was not under arrest and was giving a statement voluntarily. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Law enforcement officials are not required to inform a juvenile that his parents or attorney are actually present before taking his voluntary confession, and their failure to do so does not render the juvenile's confession involuntary as a matter of law or otherwise inadmissible. State v. Gibson, 342 N.C. 142, 463 S.E.2d 193 (1995).

Waiver of Rights. — The additional language added to the adult rights form adequately conveyed the substance of juvenile defendant's right to have his mother present during questioning; it was clear defendant understood this right, and his actions were a knowing and intelligent waiver of the right. State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996).

Applicability to Statements Resulting from Custodial Interrogation. — This section pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Cited in State v. Aikens, 342 N.C. 567, 467 S.E.2d 99 (1996); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

§ 7A-596. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

CASE NOTES

Error in Lineup Harmless. — Though detective's actions did not comply with this section, defendant did not produce any evidence which tended to show that his subsequent confession was the direct result of the photo lineup; thus, any error was harmless. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

§ 7A-598. Grounds for order.

An order may issue only on affidavit or affidavits sworn to before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed which if committed by an adult would be a felony offense; and

(2) That there are reasonable grounds to suspect that the juvenile named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the juvenile named in the affidavit committed the offense. (1979, c. 815, s. 1; 1997-80, s. 11.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, and applicable to offenses committed on or after that date, substituted "a felony offense" for "punishable by imprisonment for more than two years" following "adult would be" in subdivision (1).

§ 7A-600. Nontestimonial identification order at request of juvenile.

A juvenile in custody for or charged with an offense which if committed by an adult would be a felony offense may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid to the juvenile's defense, the judge to whom the request was directed must order the State to conduct the identification procedures. (1979, c. 815, s. 1; 1997-80, s. 12.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, and applicable to offenses committed on or after that date, substituted "a felony offense" for "punishable by imprisonment for more than two years" following "adult would be".

§ 7A-603. Fingerprinting and photographing delinquent juveniles.

(a) A juvenile shall be fingerprinted and photographed by a law enforcement officer or agency upon adjudication of the juvenile as a delinquent pursuant to G.S. 7A-637 if the juvenile was 10 years of age or older at the time the juvenile allegedly committed an offense that would be a Class A, B, C, D, or E felony if committed by an adult. Upon adjudication, the court shall order the juvenile be fingerprinted and photographed in a proper format for transfer to the State Bureau of Investigation.

(b) Fingerprints obtained pursuant to this section shall be transferred to the State Bureau of Investigation in a format approved by the State Bureau of Investigation and placed in the Automated Fingerprint Identification System (AFIS) to be used for all investigative and comparison purposes. Photographs shall be placed in a format approved by the State Bureau of Investigation and may be used for all investigative or comparison purposes.

(c) Fingerprints and photographs taken pursuant to this section are not public records under Chapter 132 of the General Statutes, shall not be included in the clerk's record pursuant to G.S. 7A-675, shall be maintained separately from any juvenile record, shall be withheld from public inspection or examination, and shall not be eligible for expunction pursuant to G.S. 7A-676. (1996, 2nd Ex. Sess., c. 18, s. 23.2(a).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 23.2(f), made this section effective October 1, 1996, and applicable to offenses committed on or after that date.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

§§ 7A-604 through 7A-607: Reserved for future codification purposes.

ARTICLE 49.

Transfer to Superior Court.

§ 7A-608. Transfer of jurisdiction of juvenile to superior court.

CASE NOTES

Doli Incapax Abolished. — Although the doctrine of doli incapax may still apply in other contexts, this section, as amended in 1994, expresses legislative intent to supersede the doctrine of doli incapax in the context of the transfer of a juvenile, between the ages of thirteen and fourteen, to superior court for trial. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

Birthday Rule. — The modern "birthday rule", under which a person attains a given age on the anniversary date of his or her birth is more reflective of common practice and understanding as to when a person reaches a given age. In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

Fractions of days may not be considered in determining when a juvenile can be transferred to superior court for trial pursuant to this section. In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

Transfer Not Proper. — Where juvenile turned eighteen while a case against him was pending in the Court of Appeals, the district court's jurisdiction automatically terminated and the superior court lacked subject matter jurisdiction, because the district court did not properly transfer the case to its jurisdiction. State v. Dellinger, 343 N.C. 93, 468 S.E.2d 218 (1996).

Cited in State v. Aikens, 342 N.C. 567, 467 S.E.2d 99 (1996).

§ 7A-610. Procedure upon finding of probable cause.

CASE NOTES

Constitutionality. — Defendants contention that this section failed to guarantee due process because it was vague and overbroad was without merit. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

No Right to Particular Trial Division. — The decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the district court judge and is not subject to review absent a showing of gross abuse of discretion. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996).

Article 51.

Hearing Procedures.

§ 7A-629. Adjudicatory hearing.

CASE NOTES

Cited in In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1995).

§ 7A-631. Conduct of hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Quoted in In re Davis, 345 N.C. App. 749, 483 S.E.2d 440 (1997).

§ 7A-637. Adjudication.

CASE NOTES

Applied in In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Article 52.

Dispositions.

§ 7A-646. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation.

In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. A juvenile should not be committed to training school or to any other institution if the juvenile can be helped through community-level resources. Article 81B of Chapter 15A of the General Statutes does not apply to juvenile dispositions, except as provided in G.S. 7A-652(c). (1979, c. 815, s. 1; 1995 (Reg. Sess., 1996), c. 609, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to dispositions for offenses committed on or after that date, substituted "the juvenile's" for "his" preceding "family" in the second and third sentences of the first paragraph; and in the second paragraph substituted "the juvenile" for "he" in the next-to-last sentence, and added the last sentence.

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

(1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

  a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

  b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

  c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. The Director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable or unable to act on behalf of their child or children, the Director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or his designee in the custody or physical custody of a county Department of Social Services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the Director shall make reasonable efforts to obtain consent from a parent or guardian of the affected child. If the Director can not obtain such consent, the Director shall promptly notify the parent or guardian that care or treatment has been provided and shall give him frequent status reports on the circumstances of the child. Upon request of a parent or guardian of the affected child, the results or records of the aforementioned evaluations, findings or treatment shall be made available to such parent or guardian by the Director unless prohibited by G.S. 122C-53(d).

(3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile.

a. Upon completion of the examination, the judge shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other treatment and who should pay the cost of the treatment. The county manager, or such person who shall be designated by the chairman of the county commissioners, of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, the judge shall permit the parent or other responsible persons to arrange for treatment. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of the care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of treatment, the judge shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment. The county department of social services shall recommend the facility that will provide the juvenile with treatment.

b. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the judge shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

(4) **[Effective October 1, 1999]** In any case in which a juvenile, who was at least eleven years of age at the time of the offense, is adjudicated delinquent for committing a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.3 (second degree rape), 14-27.4 (first degree sexual offense), 14-27.5 (second degree sexual offense), or G.S. 14-27.6 (attempted rape or sexual offense), the judge, upon a finding that the juvenile is a danger to the community, may order that the juvenile register in accordance with Part 4 of Article 27A of Chapter 14 of the General Statutes. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to dispositions for offenses committed on or after that date, in subdivision (3), added the subdivision a. and b. designations; in subdivision (3)a., added the present first and second sentences, substituted "the judge shall permit" for "he shall allow" in the present third sentence, substituted "treatment" for "care" in the present third and fifth sentences, substituted "the care" for "such care" in the present fourth sentence, and substituted "shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment" for "may charge the cost to the county" in the present fifth sentence, and added the last sentence; and, in subdivision (3)b., in the first sentence, substituted "developmentally disabled" for "mentally retarded", substituted "the juvenile" for "him", and inserted "services" following "substance abuse", and, in the third sentence, substituted "the juvenile's" for "his".

The 1997 amendment, effective October 1, 1999, added subdivision (4).

§ 7A-649. Dispositional alternatives for delinquent juvenile.

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 11.35, provides for the funding of treatment and education programs for children under the age of 18 who suffer from emotional, mental, or neurological handicaps accompanied by violent or assaultive behavior, identified as a Class in the case of Willie M., et al v. Hunt, et al., and defined in G.S. 122C-3(13a) as Eligible Assaultive and Violent Children. Section 11.35(h) specifies that unexpended funds used to cover placement and services for Willie M. Class members unexpended from prior fiscal years shall not be subject to the equirements of G.S. 143-18. For previous funding provisions, see Session Laws 1995, c. 324, s. 23.20.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Legal Periodicals. — For note, "Holding a Child in Contempt," see 46 Duke L.J. 353 (1996).

CASE NOTES

Restitution Order Vacated. — Remand ordered where the evidence in the record did not support the amount of restitution ordered. In re Davis, 345 N.C. App. 749, 483 S.E.2d 440 (1997).

§ 7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.

(a) If the court orders medical, surgical, psychiatric, psychological, or other treatment pursuant to G.S. 7A-647(3), the court may order the parent or other responsible parties to pay the cost of the treatment or care ordered.

(b) The court may order the parent to provide transportation for a juvenile to keep an appointment with a court counselor.

(b1) At the dispositional hearing or a subsequent hearing in the case of a juvenile who has been adjudicated delinquent, undisciplined, abused, neglected, or dependent, if the court finds that it is in the best interest of the juvenile for the parent to be directly involved in the juvenile's treatment, the court may order the parent to participate in medical, psychiatric, psychological, or other treatment of the juvenile. The cost of the treatment shall be paid pursuant to G.S. 7A-647(3)a.

(b2) At the dispositional hearing or a subsequent hearing in the case of a juvenile who has been adjudicated delinquent, undisciplined, abused, neglected, or dependent, the court may determine whether the best interest of the juvenile requires that the parent undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent. If the court finds that the best interest of the juvenile requires the parent undergo treatment, it may order the parent to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent upon the parent's compliance with the plan of treatment. The court may order the parent to pay the cost of treatment ordered pursuant to this subsection. In cases in which the court has conditioned legal custody or physical placement of the juvenile with the parent upon the parent's compliance with a plan of treatment, the court may charge the cost of the treatment to the county of the juvenile's residence if the court finds the parent is unable to pay the cost of the treatment. In all other cases, if the court finds the parent is unable to pay the cost of the treatment ordered pursuant to this subsection, the court may order the parent to receive treatment currently available from the area mental health program that serves the parent's catchment area.

(c) Whenever legal custody of a juvenile is vested in someone other than the juvenile's parent, after due notice to the parent and after a hearing, the court may order that the parent pay a reasonable sum that will cover in whole or in part the support of the juvenile after the order is entered. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c). If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof.

(d) Failure of a parent who is personally served to participate in or comply with subsections (a) through (c) may result in a civil proceeding for contempt. (1979, c. 815, s. 1; 1983, c. 837, ss. 2, 3; 1987, c. 598, s. 2; 1989, c. 218; c. 529, s. 7; 1995, c. 328, s. 2; 1995 (Reg. Sess., 1996), c. 609, s. 4; 1997-456, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to dispositions for offenses committed on or after that date, in subsection (b1), substituted "juvenile" for "and to pay the costs thereof. If the court finds that the parent is unable to pay the cost of the treatment, the court may charge the cost to the county of the juvenile's residence", and added the last sentence.

The 1997 amendment, effective August 29, 1997, deleted "juvenile" preceding "juvenile" at the end of the first sentence of subsection (b1).

§ 7A-651. Dispositional order.

(a) The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The judge shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

(b) A dispositional order under which a juvenile is removed from the custody of a parent or person standing in loco parentis shall direct that the review hearing required by G.S. 7A-657 be held within six months of the date of the juvenile's placement in custody and, if practicable, shall set the date and time for the review hearing.

(c) Any order directing placement of a juvenile in foster care shall also contain:

(1) A finding that the juvenile's continuation in or return to his own home would be contrary to the juvenile's best interest; and

(2) Findings as to whether reasonable efforts have been made to prevent or eliminate the need for placement of the juvenile in foster care. A finding that reasonable efforts were not made shall not preclude entry of a dispositional order authorizing placement in foster care when the court finds that such placement is needed for protection of the juvenile. When efforts to prevent the need for the juvenile's placement are precluded by an immediate threat of harm to the juvenile, the court may find that placement of the juvenile in the absence of such efforts is reasonable.

The order may provide for services or other efforts aimed at returning the juvenile promptly to a safe home. If the court finds through written findings of fact that efforts to eliminate the need for placement of the juvenile in custody clearly would be futile or would be inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time, the court shall specify in its order that reunification efforts are not required or order that reunification efforts cease.

(d) An order that places a juvenile in the custody of a county department of social services for placement shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the county department is to provide or arrange for the foster care or other placement of the juvenile.

(e) An order that commits a juvenile to the Division of Youth Services shall recite detailed findings that support commitment to the Division as the least restrictive alternative in light of the circumstances. These findings shall state that all alternatives to commitment prescribed in G.S. 7A-647, 7A-648, and 7A-649 have been attempted unsuccessfully or were considered and found to be inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community. These findings shall be supported by substantial evidence in the record that the judge determined the needs of the juvenile, determined the appropriate community resources required to meet those needs, and explored and exhausted or considered inappropriate those resources prior to committing the juvenile to the Division. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 10; 1991, c. 434, s. 1; 1997-390, s. 8.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to actions commenced on and after that date, deleted "to prevent or eliminate the need for placement" preceding "shall not preclude" in subdivision (c)(2); and added the last sentence of subsection (c).

CASE NOTES

Duty of Department to Reunify Family. — The trial court cannot relieve the Department of Social Services (DSS) of its duty to prevent or eliminate the placement of a juvenile in foster care and to reunify the family, but is required to make findings as to the efforts of DSS to reunify the family. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995).

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(a) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the alternatives to commitment as contained in G.S. 7A-647, 7A-648, and 7A-649 have been attempted unsuccessfully or were considered and found to be inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community. These findings shall be supported by substantial evidence in the record that the judge determined the needs of the juvenile, determined the appropriate community resources required to meet those needs, and explored and exhausted or considered inappropriate those resources prior to committing the juvenile to the Division.

(b) Commitment shall be for:

(1) An indefinite term not to exceed the eighteenth birthday of the juvenile; or

(2) A definite term not to exceed two years if the judge finds that the juvenile is 14 years of age or older, has been previously adjudicated delinquent for two or more felony offenses, and has been previously committed to a residential facility operated by the Division of Youth Services. The Division may reduce the duration of the definite commitment by an amount not to exceed twenty-five percent (25%) if the juvenile has not committed any major infractions of the regulations of any facility to which he is assigned, and the Division of Youth Services may move for a reduction of more than twenty-five percent (25%) pursuant to G.S. 7A-664.

(c) In no event shall commitment of a delinquent juvenile be for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior conviction level III for misdemeanors could be sentenced for the same offense. A juvenile committed only for an offense that would be a Class 3 misdemeanor if committed by an adult shall be assigned to a local detention home as defined by G.S. 7A-517(15) or a regional home as defined by G.S. 7A-517(26).

(d) The Chief Court Counselor shall have the responsibility for transporting the juvenile to the residential facility designated by the Division of Youth Services. The juvenile shall be accompanied to the residential facility by a person of the same sex.

(d1) The Chief Court Counselor shall insure that the records requested by the Director of Youth Services accompany the juvenile upon transportation for admittance to a training school or, if not obtainable at the time of admission, are sent to the training school within 15 days of the admission. If records requested by the Division of Youth Services for admission do not exist, to the best knowledge of the Chief Court Counselor, he shall so stipulate in writing to the training school. If such records do exist, but the Chief Court Counselor is unable to obtain copies of them, a district court judge may order that the records from public agencies be made available to the training school. Records that are confidential by law shall remain confidential and the Division of Youth Services shall be bound by the specific laws governing the confidentiality of these records. All records shall be used in a manner consistent with the best interest of the juvenile.

(e) The Division of Youth Services shall accept all juveniles who have been committed for delinquency when the order of commitment appears on its face to contain the findings required by G.S. 7A-651(e) but may decline to do so otherwise. A commitment order accompanied by information requested by the Director shall be forwarded to the Division. The Director shall place the juvenile in the residential facility that would best provide for his needs and shall notify the committing court. The Secretary of the Department of Health and Human Services may assign a juvenile committed for delinquency to any institution or other program of the Department or licensed by the Department, which program is appropriate to the needs of the juvenile.

(f) When the judge commits a juvenile to the Division of Youth Services, the Director shall prepare a plan for care or treatment within 30 days after assuming custody of the juvenile.

(g) Commitment of a juvenile to the Division of Youth Services does not terminate the court's continuing jurisdiction rights over the juvenile and his parent or guardian. Commitment of a juvenile to the Division of Youth Services transfers only physical custody of the juvenile to the Division. Legal custody remains with the parent, guardian, agency or institution in whom it was vested. (1979, c. 815, s. 1; 1983, c. 133, s. 2; 1987, c. 100; c. 372; 1991, c. 434, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 609, s. 2; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to dispositions for offenses committed on or after that date, rewrote subsection (c).

The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

CASE NOTES

Purpose of Section and Amendment. — This section allows a trial court to commit a juvenile for the maximum period of time that any adult could be committed for the same offense, without considering prior record levels and aggravating/mitigating factors as required under structured sentencing for adults; this interpretation is supported by the purpose of disposition in juvenile actions and the amendment effective December 1, 1996. In re Carter, 125 N.C. App. 140, 479 S.E.2d 284 (1996).

OPINIONS OF ATTORNEY GENERAL

School Records of Juveniles. — Local school boards can and should transmit to the Division of Youth Services (DYS) and other Department of Human Resources (DHR) agencies providing educational services to school age children any requested education records of juveniles committed to their custody or control. Once such education records are obtained by DYS or other DHR facilities they are confidential and must not be released except as permitted by the Family Educational Rights and Privacy Act. See opinion of C. Robin Britt, Sr., Secretary North Carolina Department of Human Resources, — N.C.A.G. — (July 24, 1995).

§ 7A-653. Transfer authority of Governor.

The Governor may order transfer of any person less than 18 years of age from any jail or penal facility of the State to one of the residential facilities operated by the Division of Youth Services in appropriate circumstances, provided the Governor shall consult with the Department of Health and Human Services concerning the feasibility of the transfer in terms of available space, staff, and suitability of program.

When an inmate, committed to the Department of Correction, is transferred by the Governor to a residential program operated by the Division of Youth Services, the Division of Youth Services may release the juvenile based on the needs of the juvenile and the best interests of the State. Transfer shall not divest the probation-parole officer of his responsibility to supervise the inmate on release. (1979, c. 815, s. 1; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

§ 7A-655. Conditional release and final discharge.

The Division of Youth Services shall release a juvenile either by conditional release or by final discharge. The decision as to which type of release is appropriate shall be made by the Director based on the needs of the juvenile and the best interests of the State under rules and regulations governing release which shall be promulgated by the Division of Youth Services, according to the following guidelines:

(1) Conditional release is appropriate for a juvenile needing supervision after leaving the institution. As part of the prerelease planning process, the terms of conditional release shall be set out in writing and a copy given to the juvenile, the juvenile's parent, the committing court, and the court counselor who will provide aftercare supervision. The time that a juvenile spends on conditional release shall be credited toward the juvenile's maximum period of commitment to the Division of Youth Services.

(2) Final discharge is appropriate when the juvenile does not require supervision, has completed a maximum commitment for the juvenile's offense, or is 18 years of age.

(3) Notwithstanding G.S. 7A-675, before the Division of Youth Services considers for release a juvenile who is serving a commitment for a Class A or B1 felony, the Division shall notify, at least 30 days in advance of considering the release, by first class mail at the last known address:
   a. The juvenile;
   b. The juvenile's parent, guardian, or custodian;
   c. The district attorney of the district where the juvenile was adjudicated;
   d. The head law enforcement agency that took the juvenile into custody; and

e. The victim, and any of the victim's immediate family members who have requested in writing to be notified.

The notification shall include only the juvenile's name, offense, date of commitment, and date of consideration for release. (1979, c. 815, s. 1; 1983, c. 133, s. 1; c. 276, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 23.2(e).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective October 1, 1996, and applicable to juveniles considered for release on or after that date, added subdivision (3) and made stylistic changes.

§ 7A-657. Review of custody order.

(a) In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, shall conduct a second review within six months after the first review, and shall conduct subsequent reviews at least every year thereafter. The Director of Social Services shall make timely requests to the clerk to calendar the case at a session of court scheduled for the hearing of juvenile matters within six months of the date the order was entered. The Director shall make timely requests for calendaring subsequent reviews. The clerk shall give 15 days' notice of the review to the parent or the person standing in loco parentis, the juvenile if 12 years of age or more, the guardian, foster parent, custodian or agency with custody, the guardian ad litem, and any other person the court may specify, indicating the court's impending review.

(b) Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a), may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every 12 months, if the court finds by clear, cogent and convincing evidence that:

(1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year; and

(2) The placement is stable and continuation of the placement is in the juvenile's best interest; and

(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every 12 months; and

(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and

(5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review.

(c) At every review hearing, the court shall consider information from the Department of Social Services, the court counselor, the juvenile, the parent or person standing in loco parentis, the custodian, the foster parent, the guardian ad litem, and any public or private agency which will aid it in its review.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsisent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time;

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care;

(3) Goals of the foster care placement and the appropriateness of the foster care plan;

(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile;

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent;

(6) When and if termination of parental rights should be considered;

(7) Any other criteria the court deems necessary.

(d) The judge, after making findings of fact, may appoint a guardian of the person for the juvenile pursuant to G.S. 7A-585 or may make any disposition authorized by G.S. 7A-647, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile. If the juvenile is placed in or remains in the custody of the department of social services, the court may authorize the department to arrange and supervise a visitation plan. Except for such visitation, the juvenile shall not be returned to the parent or person standing in loco parentis without a hearing at which the court finds sufficient facts to show that the juvenile will receive proper care and supervision. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

(d1) At a hearing designated by the court, but at least within 12 months after the juvenile's placement, a review hearing shall be held under this section and designated as a permanency planning hearing. The purpose of the hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. Notice of the hearing shall inform the parties of the purpose of the hearing. At the conclusion of the hearing, if the juvenile is not returned home, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time and shall enter an order consistent with those findings.

(e) The provisions of subsections (b), (c), and (d) of G.S. 7A-651 shall apply to any order entered under this section which continues the foster care placement of a juvenile. (1979, c. 815, s. 1; 1987, c. 810; 1987 (Reg. Sess., 1988), c. 1090, s. 11; 1989, c. 152, s. 1; 1997-390, s. 9.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to actions commenced on and after that date, rewrote this section.

CASE NOTES

Construction with Other Sections. — It is not necessary for there to be evidence of mental retardation, mental illness, organic brain syndrome, or some other degenerative mental condition, which would be required in a termination of parental rights determination pursuant to § 7A-289.32(7), for the evidence to be sufficient in a review hearing under this section to evince a lack of ability to perform mentally that impedes a parent's child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995).

Duty of Department to Reunify Family. — The trial court cannot relieve the Department of Social Services (DSS) of its duty to prevent or eliminate the placement of a juvenile in foster care and to reunify the family, but is required to make findings as to the efforts of DSS to reunify the family. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995).

Parent's Lack of Ability to Perform Mentally. — Evidence that mother was vulnerable to the influence of others and that she continued to live in a trailer that had the smell of kerosene, the problem that gave rise to the original removal of her minor child from the home, supported a finding that the mother had a diminished capacity inhibiting her from making appropriate decisions for her child's care, which was sufficient in a review hearing under this section to evince a lack of ability to perform mentally that impeded her child care decisions. In re Reinhardt, 121 N.C. App. 201, 464 S.E.2d 698 (1995).

§ 7A-659. Post termination of parental rights' placement court review.

CASE NOTES

Cited in In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1996).

ARTICLE 53.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7A-666. Right to appeal.

CASE NOTES

Oral Notice of Appeal from Final Order. — When the second sentence of this section permitting oral notice of appeal at the hearing, is read in conjunction with the first sentence providing for appellate review only upon any "final order," it appears that oral notice of appeal given at the time of the hearing must be from a final order. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Cited in In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

§ 7A-667. Proper parties for appeal.

CASE NOTES

Cited in In re Robinson, 120 N.C. App. 874, 464 S.E.2d 86 (1995).

ARTICLE 54.

Juvenile Records and Social Reports.

§ 7A-675. Confidentiality of records.

(a) The clerk of superior court shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record, which shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the judge. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the judge.

The following persons may examine the juvenile's record without an order of the judge:

(1) The juvenile, the juvenile's parent, guardian, or custodian, or another authorized representative of the juvenile.

(2) The prosecutor in a subsequent criminal proceeding against the juvenile.

The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), G.S. 15A-1340.16(d), or G.S. 15A-2000(e). The record may be so used only by order of the judge in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

(b) The Chief Court Counselor shall maintain a record of the cases of juveniles under supervision by court counselors which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or his family; a record of the probation reports of a juvenile; interviews with his family; or other information which the judge finds should be protected from public inspection in the best interest of the juvenile.

(c) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by his Department or under placement by the court. This file shall include material similar in nature to that described in subsection (b).

(d) The records maintained pursuant to subsections (b) and (c) may be examined only by order of the judge except that the juvenile shall have the right to examine them.

(e) Law-enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to superior court. Law-enforcement records and files concerning juveniles shall be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, and custodian.

(f) All records and files maintained by the Division of Youth Services shall be withheld from public inspection and shall be open only to the inspection of the juvenile, professionals in that agency who are directly involved in the juvenile's case, and court counselors. The judge authorizing commitment of a juvenile shall have the right to inspect and order the release of records maintained by the Division of Youth Services on that juvenile.

(g) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.

(h) The chief district court judge in each district shall designate by standing order certain agencies in the district as "agencies authorized to share information". Agencies so designated shall share with one another, upon request, information that is in their possession that is relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, or dependent, and shall continue to do so until the juvenile is no longer subject to the juvenile jurisdiction of the court. Agencies that may be designated as "agencies authorized to share information" include local mental health facilities, local health departments, local departments of social services, local law enforcement agencies, local school administrative units, the district's district attorney's office, the Division of Juvenile Services of the Administrative Office of the Courts, and the Office of Guardian ad Litem Services of the Administrative Office of the Courts. Any information shared among agencies pursuant to this subsection shall remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile. Nothing in this section or any other provision of law shall preclude any other necessary sharing of information among agencies. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(i) In the case of a child victim, a judge may order the sharing of information among such public agencies as the judge deems necessary to reduce the trauma to the child victim.

(j) Notwithstanding subsection (a) of this section, the court's entire record of a proceeding involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes is not a matter of public record, shall be maintained separately from any juvenile record, shall be withheld from public inspection, and may be examined only by order of the court, by the unemancipated minor, or by the unemancipated minor's attorney or guardian ad litem. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2.)

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, rewrote subsection (h).

§ 7A-675.1. Disclosure in child fatality or near fatality cases.

(a) The following definitions apply in this section:

(1) "Child fatality" means the death of a child from suspected abuse, neglect, or maltreatment.

(2) "Findings and information" means a written summary, as allowed by subsections (c) through (f) of this section, of actions taken or services rendered by a public agency following receipt of information that a child might be in need of protection. The written summary shall include any of the following information the agency is able to provide:

a. The dates, outcomes, and results of any actions taken or services rendered.

b. The results of any review by the State Child Fatality Prevention Team, a local child fatality prevention team, a local community child protection team, the Child Fatality Task Force, or any public agency.

c. Confirmation of the receipt of all reports, accepted or not accepted by the county department of social services, for investigation of suspected child abuse, neglect, or maltreatment, including confirmation that investigations were conducted, the results of the investigations, a description of the conduct of the most recent investigation and the services rendered, and a statement of basis for the department's decision.

(3) "Near fatality" means a case in which a physician determines that a child is in serious or critical condition as the result of sickness or injury caused by suspected abuse, neglect, or maltreatment.

(4) "Public agency" means any agency of State government or its subdivisions as defined in G.S. 132-1(a).

(b) Notwithstanding any other provision of law and subject to the provisions of subsections (c) through (f) of this section, a public agency shall disclose to the public, upon request, the findings and information related to a child fatality or near fatality if:

(1) A person is criminally charged with having caused the child fatality or near fatality; or

(2) The district attorney has certified that a person would be charged with having caused the child fatality or near fatality but for that person's prior death.

(c) Nothing herein shall be deemed to authorize access to the confidential records in the custody of a public agency, or the disclosure to the public of the substance or content of any psychiatric, psychological, or therapeutic evaluations or like materials or information pertaining to the child or the child's family unless directly related to the cause of the child fatality or near fatality, or the disclosure of information that would reveal the identities of persons who provided information related to the suspected abuse, neglect, or maltreatment of the child.

(d) Within five working days from the receipt of a request for findings and information related to a child fatality or near fatality, a public agency shall consult with the appropriate district attorney and provide the findings and information unless the agency has a reasonable belief that release of the information:

(1) Is not authorized by subsections (a) and (b) of this section;

(2) Is likely to cause mental or physical harm or danger to a minor child residing in the deceased or injured child's household;
(3) Is likely to jeopardize the State's ability to prosecute the defendant;
(4) Is likely to jeopardize the defendant's right to a fair trial;
(5) Is likely to undermine an ongoing or future criminal investigation; or
(6) Is not authorized by federal law and regulations.

(e) Any person whose request is denied may apply to the appropriate superior court for an order compelling disclosure of the findings and information of the public agency. The application shall set forth, with reasonable particularity, factors supporting the application. The superior court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the appellate courts. After the court has reviewed the specific findings and information, in camera, the court shall issue an order compelling disclosure unless the court finds that one or more of the circumstances in subsection (d) of this section exist.

(f) Access to criminal investigative reports and criminal intelligence information of public law enforcement agencies, and confidential information in the possession of the State Child Fatality Prevention Team, the local teams, and the Child Fatality Task Force, shall be governed by G.S. 132-1.4 and G.S. 143-578 respectively. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(g) Any public agency or its employees acting in good faith in disclosing or declining to disclose information pursuant to this section shall be immune from any criminal or civil liability that might otherwise be incurred or imposed for such action.

(h) Nothing herein shall be deemed to narrow or limit the definition of "public records" as set forth in G.S. 132-1(a). (1997-459, s. 1.)

Editor's Note. — The subdivisions in subsection (a) have been renumbered at the direction of the Revisor of Statutes.

Session Laws 1997-459, s. 4, makes this section effective October 1, 1997.

§ 7A-675.2. Notification of schools when juveniles are alleged or found to be delinquent.

(a) Notwithstanding G.S. 7A-675, the juvenile court counselor shall deliver verbal and written notification of the following actions to the principal of the school that the juvenile attends:
(1) A petition is filed under G.S. 7A-560 that alleges delinquency for an offense that would be a felony if committed by an adult;
(2) The judge transfers jurisdiction over a juvenile to superior court under G.S. 7A-608;
(3) The judge dismisses under G.S. 7A-637 the petition that alleges delinquency for an offense that would be a felony if committed by an adult;
(4) The judge issues a dispositional order under Article 52 of Chapter 7A of the General Statutes including, but not

limited to, an order of probation that requires school attendance, concerning a juvenile alleged or found delinquent for an offense that would be a felony if committed by an adult; or

(5) The judge modifies or vacates any order or disposition under G.S. 7A-664 concerning a juvenile alleged or found delinquent for an offense that would be a felony if committed by an adult.

Notification of the school principal in person or by telephone shall be made before the beginning of the next school day. Delivery shall be made as soon as practicable but at least within five days of the action. Delivery shall be made in person or by certified mail. Notification that a petition has been filed shall described the nature of the offense. Notification of a dispositional order, a modified or vacated order, or a transfer to superior court shall describe the judge's action and any applicable disposition requirements. As used in this subsection, the term "offense" shall not include any offense under Chapter 20 of the General Statutes.

(b) If the principal of the school the juvenile attends returns any notification as required by G.S.115C-404, and if the juvenile court counselor learns that the juvenile is transferring to another school, the juvenile court counselor shall deliver the notification to the principal of the school to which the juvenile is transferring. Delivery shall be made as soon as practicable and shall be made in person or by certified mail.

(c) Principals shall handle any notification delivered under this section in accordance with G.S. 115C-404.

(d) For the purpose of this section, "school" means any public or private school in the State that is authorized under Chapter 115C of the General Statutes. (1997-443, s. 8.29(e).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 8.29(e), makes this section effective November 1, 1997.

Session Laws 1997-443, s. 35.4, is a severability clause.

§ 7A-675.3. Juvenile recidivism rates.

(a) On an annual basis, the Administrative Office of the Courts shall compute the recidivism rate of juveniles who are adjudicated delinquent for offenses that would be Class A, B1, B2, C, D, or E felonies if committed by adults and who subsequently are adjudicated delinquent or convicted and shall report the statistics to the Joint Legislative Commission on Governmental Operations by December 31 each year.

(b) The Chief Court Counselor of each judicial district shall forward to the Administrative Office of the Courts relevant information, as determined by the Administrative Office of the Courts, regarding every juvenile who is adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult for the purpose of computing the statistics required by this section. (1997-443, s. 18.15(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 18.15(b),

provides: "The Administrative Office of the Courts shall use funds available to the Office to implement this section."

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1997-443, s. 35.5, makes this section effective July 1, 1997.

§ 7A-676. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

(a) Any person who has attained the age of 16 years may file a petition in the court where the person was adjudicated undisciplined for expunction of all records of that adjudication.

(b) Any person who has attained the age of 16 years may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication provided:

(1) The offense for which the person was adjudicated would have been a crime other than a Class A, B1, B2, C, D, or E felony if committed by an adult.

(2) The person has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

Records relating to an adjudication for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult shall not be expunged.

(c) The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior since the adjudication and, in the case of a petition based on a delinquency adjudication, that he has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States, or the laws of this State or any other state;

(2) Verified affidavits of two persons, who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good;

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined.

The petition shall be served upon the district attorney in the district wherein adjudication occurred. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.

(d) If the judge, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) or (b), he shall order and direct the clerk of superior court and all law-enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.

(e) The clerk of superior court shall forward a certified copy of the order to the sheriff, chief of police, or other law-enforcement agency.

(f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by the Chief Court Counselor, an intake counselor or a court counselor shall be retained or disposed of as provided by the Juvenile Services Division.

(g) Records of a juvenile adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Division of Youth Services, shall be retained or disposed of as provided by the Department of Health and Human Services.

(h) Any juvenile or any person who has attained the age of 16 years may file a petition in the court in which he was alleged to be delinquent or undisciplined for expunction of all juvenile records of his having been alleged to be delinquent or undisciplined if the court dismissed the juvenile petition without an adjudication that the juvenile was delinquent or undisciplined. The petition shall be served on the chief court counselor in the district where the juvenile petition was filed. The chief court counselor shall have 10 days thereafter in which to file a written objection in the court. If no objection is filed, the judge may grant the petition without a hearing. If an objection is filed or the judge so directs, a hearing shall be scheduled and the chief court counselor shall be notified as to the date of the hearing. If the judge finds at the hearing that the petitioner satisfies the conditions specified herein, the judge shall order the clerk of superior court and the appropriate law enforcement agencies to expunge their records of the allegations of delinquent or undisciplined acts including all references to arrests, complaints, referrals, juvenile petitions, and orders. The clerk of superior court shall forward a certified copy of the order of expunction to the sheriff, chief of police, or other appropriate law enforcement agency, and to the chief court counselor, and these specified officials shall immediately destroy all records relating to the allegations that the juvenile was delinquent or undisciplined. (1979, c. 815, s. 1; 1989, c. 186; 1994, Ex. Sess., c. 7, s. 2; 1995, c. 509, s. 6; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

Article 60.

Office of Administrative Hearings.

§ 7A-751. Agency head; powers and duties; salaries of Chief Administrative Law Judge and other administrative law judges.

(a) The head of the Office of Administrative Hearings is the Chief Administrative Law Judge, who shall serve as Director of the Office. The Chief Administrative Law Judge has the powers and duties conferred on that position by this Chapter and the Constitution and laws of this State and may adopt rules to implement the conferred powers and duties.

The salary of the Chief Administrative Law Judge shall be the same as that fixed from time to time for district court judges.

In lieu of merit and other increment raises, the Chief Administrative Law Judge shall receive longevity pay on the same basis as is provided to employees of the State who are subject to the State Personnel Act.

(b) The salary of other administrative law judges shall be ninety percent (90%) of the salary of the Chief Administrative Law Judge.

In lieu of merit and other increment raises, an administrative law judge shall receive longevity pay on the same basis as is provided to employees who are subject to the State Personnel Act. (1985, c. 746, s. 2; 1987, c. 774, s. 1; c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1100, s. 16(b); c. 1111, s. 14(b); 1989, c. 500, s. 45; 1991, c. 103, s. 1; 1997-34, s. 11; 1997-443, s. 33.8.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-34, s. 11, effective April 23, 1997, rewrote the first paragraph; and in the beginning of the second paragraph added "The" preceding "salary", and inserted "of the Chief Administrative Law Judge" preceding "shall be".

Session Laws 1997-443, s. 33.8, effective July 1, 1997, inserted "salaries of Chief Administrative Law Judge and other administrative law judges" in the catchline; added the subsection (a) designation; rewrote the second paragraph of subsection (a); and added subsection (b).

§ 7A-759. (Effective until December 31, 1998) Role as deferral agency.

(a) The Office of Administrative Hearings is designated to serve as the State's deferral agency for cases deferred by the Equal Employment Opportunity Commission to the Office of Administrative Hearings as provided in Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. for charges filed by State or local government employees covered under Chapter 126 of the General Statutes and shall have all of the powers and authority necessary to function as a deferral agency.

(b) The Chief Administrative Law Judge is authorized and directed to contract with the Equal Employment Opportunity Commission for the Office of Administrative Hearings to serve as a deferral agency and to establish and maintain a Civil Rights Division in the Office of Administrative Hearings to carry out the functions of a deferral agency.

(b1) As provided in the contract between the Office of Administrative Hearings and the Equal Employment Opportunity Commission, a deferred charge for purposes of 42 U.S.C. § 2000e-5(c) or (d) is a charge that is filed by a State or local government employee covered under Chapter 126 of the General Statutes and alleges an unlawful employment practice prohibited under that Chapter or any other State law. A deferred charge may be filed with either agency.

The date a deferred charge is filed with either agency is considered to be a commencement of proceedings under State law for purposes of 42 U.S.C. § 2000e-5(c) or (d). The filing of a deferred charge automatically tolls the time limit under G.S. 126-7.2, 126-35, 126-38, and 150B-23(f) and any other State law that sets a time limit for filing a contested case under Article 3 of Chapter 150B of

§ 7A-759 has a delayed repeal date. See notes.

the General Statutes alleging an unlawful employment practice. These time limits are tolled until the completion of the investigation and of any informal methods of resolution pursued pursuant to subsection (d) of this section.

(c) In investigating charges an employee of the Civil Rights Division of the Office of Administrative Hearings specifically designated by an order of the Chief Administrative Law Judge filed in the pending case may administer oaths and affirmations.

(c1) In investigating charges, an employee of the Civil Rights Division shall have access at reasonable times to State premises, records, and documents relevant to the charge and shall have the right to examine, photograph, and copy evidence. Any challenge to the Civil Rights Division to investigate the deferred charge shall not constitute grounds for denial or refusal to produce or allow access to the investigative evidence.

(d) Any charge not resolved by informal methods of conference, conciliation or persuasion may be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.

(e) Notwithstanding G.S. 150B-34 and G.S. 150B-36, an order entered by an administrative law judge after a contested case hearing on the merits of a deferred charge is a final agency decision and is binding on the parties. The administrative law judge may order whatever remedial action is appropriate to give full relief consistent with the requirements of federal statutes or regulations or State statutes or rules.

(f) In addition to the authority vested in G.S. 7A-756 and G.S. 150B-33, an administrative law judge may monitor compliance with any negotiated settlement, conciliation agreement or order entered in a deferred case.

(g) The standards of confidentiality established by federal statute or regulation for discrimination charges shall apply to deferred cases investigated or heard by the Office of Administrative Hearings.

(h) Nothing in this section shall be construed as limiting the authority or right of any federal agency to act under any federal statute or regulation.

(i) This section shall be broadly construed to further the general purposes stated in this section and the specific purposes of the particular provisions involved. (1987 (Reg. Sess., 1988), c. 1111, s. 14(c); 1993, c. 234, s. 1; 1997-513, s. 1.)

For this section as in effect December 31, 1998, see the main volume.

Editor's Note. — Session Laws 1997-513, s. 4 states that this act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that State agency.

Session Laws 1997-513, s. 5 provides that s. 1 is effective when it becomes law (September 17, 1997) and is applicable to charges pending or filed on and after that date, and expires December 31, 1998.

Effect of Amendments. — The 1997 amendment, effective September 17, 1997, and expiring December 31, 1998, added subsections (b1), (c1) and (i); in subsection (d) substituted "may" for "shall"; and in subsection (e) added "or State Statutes or rules" to the end. See editor's note for applicability and expiration.

CASE NOTES

Cited in Emp. Sec. Comm'n v. Peace, 122 N.C. App. 313, 470 S.E.2d 63 (1996).

SUBCHAPTER XIII. COMMUNITY PENALTIES PROGRAM.

ARTICLE 61.

Community Penalties Program Act of 1983.

§ 7A-771. Definitions.

As used in this Article:

(1) "Community penalties program" means an agency or State-run office within the judicial district which shall (i) prepare community penalty plans; (ii) arrange or contract with public and private agencies for necessary services for offenders; and (iii) monitor the progress of offenders placed on community penalty plans.

(2) "Community penalty plan" means a plan presented in writing to the sentencing judge which provides a detailed description of the targeted offender's proposed community penalty.

(2a) "Director" means the Director of the Administrative Office of the Courts.

(3) "Judicial district" means a district court district as defined in G.S. 7A-133.

(4) Repealed by Session Laws 1991, c. 566, s. 4, effective July 1, 1991.

(5) "Targeted offenders" means persons charged with or convicted of misdemeanors or felonies who are eligible to receive an intermediate punishment based on their class of offense and prior record level and who are facing an imminent and substantial threat of imprisonment. (1983, c. 909, s. 1; 1989, c. 770, s. 58; 1991, c. 566, ss. 2, 4; 1993 (Reg. Sess., 1994), c. 767, s. 14; 1995, c. 324, s. 21.9(c); 1997-57, s. 5.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997 and applicable to offenses committed on or after that date, inserted "charged with or" following "means persons" in subdivision (5).

SUBCHAPTER XIV. DRUG TREATMENT COURTS.

ARTICLE 62.

North Carolina Drug Treatment Court Act.

§ 7A-790. (Expires June 30, 1998) Short title.

Editor's Note. —

Session Laws 1996, Second Extra Session, c. 18, s. 22.2, provides: "Of the funds appropriated to the Judicial Department in the certified budget for the 1995-96 fiscal year to the Reserve for Court/Drug Treatment Program, established by Section 41 of Chapter 24 of the Session Laws of the 1994 Extra Session, as amended by Section 21.6 of Chapter 507 of the 1995 Session Laws, up to the sum of one hundred seventy-five thousand dollars ($175,000) of any balance remaining in the reserve shall not revert, but may be used during the 1996-97 fiscal year for nonrecurring program items."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 1, 1997

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1997 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

3861